16-191

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~342~~. 72

ALEXANDER FRASER AND FRANCIS P. FRASER, PLAINTIFFS IN ERROR,

vs.

WILLIAM JENNISON, WILLIAM A. MOORE, WILLIAM ADAIR, AND JOHN PETTEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 15, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 342.

ALEXANDER FRASER AND FRANCIS P. FRASER, PLAINTIFFS IN ERROR,

vs.

WILLIAM JENNISON, WILLIAM A. MOORE, WILLIAM ADAIR, AND JOHN PETTEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print
Writ of error	1	1
Citation and proof of service, &c	5	1
Transcript from Wayne circuit court	9	2
Motion to remand, &c	49	15
Order that writ of certiorari issue	57	17
Certiorari (writ)	59	18
Additional transcript	63	19
Opinion of Justice Swayne	91	30
Order remanding case to Wayne circuit court	95	32
Copy bond on writ of error	97	32
Clerk's certificate	99	33

times and in the manner hereinafter stated he served copies of the annexed and foregoing citation upon the following-named persons mentioned in said citation by handing a copy thereof to each of them personally in Detroit, in said district: To the said John Pettee on July 19th, 1879; to William A. Moore on July 21st, 1879; and to William Jennison on July 25th, 1879.

GEO. B. REMICK.

Subscribed & sworn to before me this 30th day of July, A. D. 1879.
GEO. H. LOTHROP,
Notary Public, Wayne Co., Mich.

EASTERN DISTRICT OF MICHIGAN,
Wayne County, ss:

John A. Weir, being duly sworn, deposes and says that on the 26th day of July, A. D. 1879, he served a copy of the within-annexed
8 citation upon the said William Adair by handing the same to him personally at Detroit, in said district.

JNO. A. WEIR.

Subscribed & sworn to before me this 30th day of July, A. D. 1879.
GEO. H. LOTHROP,
Notary Public, Wayne Co., Mich.

9 *Transcript from Wayne circuit court.*

In the name of God, amen.

I, Alexander D. Fraser, of the city of Detroit, State of Michigan, councellor at law, do make and declare this my last will and testament in manner & form following:

I resign my soul into the hands of Almighty God, hoping and believing in a remission of my sins by the merits & mediation of Jesus Christ; and my worldly estate I give, devise, and bequeath as follows:

First. I give & bequeath unto my nieces Margaret Davidson and Isabella, both of Inverness, Scotland, & to the survivor of them, the sum of four thousand dollars, the interest of which should be quarterly or semi-annually transmitted by my executors or trustees to them, as heretofore been done by me. This sum I estimate to be about the amount in which I am now indebted to them for monies to which they succeeded through their mother's last will & testament, and which sum heretofore I bequeath to them in full payment & discharge of and on that condition. The amount transmitted by me heretofore quarterly or semi-annually has been twenty or forty pounds sterling, and should the interest ac'ruing from said sum be inadequate to pay the premium of such amount the residue may be paid from my estate. I enjoin upon my trustees or executors to be prompt & punctual in the transmission of this annuity.

Second. I give and beque'th to another niece, Ann Munroe, of Inverness aforesaid, for her own use and benefit, and excluding the jus marite, the sum of five hundred dollars.

10 Third. I give and bequeath to Mrs. Octavia Seymour, of Detroit, the sum of one thousand dollars, in consideration of her constant attention & kindness to me during my illness.

Fourth. I give and bequeath to William Adair & John Pettie, of Detroit, in trust for the Saint Andrew's Society of Detroit, the sum of five thousand dollars, which shall be permanently invested by said society, when it shall have become duly incorporated under the laws

of this State, the interest of which shall be regularly drawn & added to the benevolent fund of the society and appropriated in all future time to the relief of any of the natives of Scotland living here who may be in necessitous circumstances, and under such regulations as the society may make from time to time.

Fifth. I give and bequeath to the Rev. A. Fraser, minister of the parish of Kirkhill and Free Church, Scotland, living at Bagsay, the sum of fifty pounds sterling for the poor of his parish, to be appropriated under his directions.

Sixth. I hereby bequeath to my friend Robert McClelland the Chatham correspondence, in four volumes, in testimony of our uniform friendship.

Seventh. I give and bequeath Mrs. Julian Williams the sum of one hundred dollars, to be appropriated by her to the purchase of a ring, to be kept as a token of our uniform friendship.

Eight. As to all and singular my real and personal estate,
11 which I now own or may own at the time of my death & wheresoever situated, and of what nature soever, I hereby give, devise, and bequeath to William A. Moore, William Jennison, William Adair and John Pettie, all of Detroit, Michigan, and their heirs & assignees forever and their heirs & administrators respectfully, not already disposed of, but in trust only and for the uses and purposes hereinafter mentioned & not otherwise:

1st. The trustees *as* a majority, or any two of them, shall take charge of all of said real and personal property, and shall pay all dues & public burdens thereon, & sell & dispose of the same at such times & place & on such terms as to them shall seem proper. They shall lay out my property on the "Chene farm," Detroit, in lots, so that those lying between Woodbridge & Franklin streets may front on Chene street, and of such size as they shall think fit.

2ond. My said trustees and executors are especially enjoined to pay all care & attendance to my beloved wife, Caroline, whose health has suffered in consequence of my illness. This disposition is made to relieve her from all unnecessary care & anxiety in the settlement of my estate. My said trustees & executors shall provide all comforts for her that she may possibly require, and to furnish her with such means that she may at any time need; and she may select her own residence. This kindness & attention I expect she shall receive during her natural life. It is my desire and intention that my said wife should be maintained, & should live in the manner that she has been accustomed to.

Third. None of the legacies above specified shall be paid until my said real estate, or an adequate portion thereof, shall be sold & paid
for, except the annuity payable to my said two nieces, Margaret
12 and Isabella Davidson.

4th. I direct that my trustees & executors shall procure and erect on my lot thirty (30), in Elmwood Cemetery, a monument of Scotch granite to my family; and I do hereby constitute and appoint the said William A. Moore, William Jennison, William Adair, & John Pettee, or any two or more of them, to be the executors of this my last and testament; and I dispense with any executor's or administrator's or trustee's bond, hereby revoking all former wills or codicils by me made.

Finally, on the demise of my said wife and the settlement of my estate, & the payment of all expenses connected therewith, I direct my said trustees and executors to transmit to my said two nieces last above mentioned, Margaret & Isabella Davidson, whatever balance or balances that may remain in their hands; it being hereby my instruction

to give & devise to them whatever surplus that may remain undisposed of to their own use & benefit. And should any of said real estate remain undisposed of, to convey the same to them or the survivor of them; but is my intention that in case of the death of both of my said nieces before the death of my said wife, then their share shall go to their sister Ann Munroe, of Inverness, I.

In witness whereof I have hereunto set my hand and seal, at Detroit, this seventeenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

(Sig.) A. D. FRASER. [SEAL.]

Signed, sealed, published, and declared by said testator as and for his last will and testament, in presence of us, who, at his request, in his presence, and in the presence of each other, have subscribed
13 our names as witnesses hereto, on the said seventeenth day of May, A. D. 1877.

ROBERT MCCLELLAND, of *Detroit*, *Michigan*.
D. BETHUNE DUFFIELD, " "
WILLIAM JENNISON, " "
LEVI BISHOP, " "
JOHN PETTEE, " "

14 STATE OF MICHIGAN,
County of Wayne, *ss*:

At a session of the probate court for said county of Wayne, holden at the probate office, in the city of Detroit, on Friday, the ninth day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

Present then, Edgar O. Durfee, judge of probate.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

The tenth day of September, A. D. 1877, having been appointed for proving the instrument heretofore delivered into this court, purporting to be the last will and testament of said deceased, and parties hearing appeared to contest the probate thereof; and said cause having been continued from time to time, and Robert McClelland, D. Bethune Duffield, William Jennison, Levi Bishop, and John Pettie, the subscribing witnesses to said instrument, having appeared in court and having testified that such instrument was signed by the said Alexander D. Fraser, and attested and subscribed in his presence by five competent witnesses, and that said testator was then of sound mind; and it appearing the court, by due proof on file, that notice of the time and place appointed for proving said instrument has been given as required by law, and it further appearing to the court that said testator was of full age at the time of executing said instrument; that at the time of his decease he was an inhabitant of said county of Wayne, and that said instrument is duly proved and ought to be allowed as the last will and testament of said deceased,

15 It is ordered and decreed that said instrument be and the same is hereby allowed, and that it have full force and effect as the last will and testament of said deceased. And it is further ordered that execution of said will be committed and the administration of said estate be granted to William A. Moore, William Jennison, William Adair, and John Pettie, executors; and that upon their giving bonds

in the penal sum of one thousand dollars with sufficient sureties, and the same being duly approved, letters testamentary do issue them.

(Sig.) EDGAR O. DURFEE,
Judge of Probate.

16 STATE OF MICHIGAN:

In the probate court for the county of Wayne.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

To the judge of probate of the county of Wayne:

Alexander Fraser, of Cairo, Illinois, and Francis P. Fraser, of Bertram, Iowa, respectfully represent that they are nephews of the above-named Alexander D. Fraser, deceased, who was a brother of the said Alexander D Fraser, deceased, and are heirs at law of said Alexander D. Fraser, deceased; that said Alexander D. Fraser, deceased in the county of Wayne, Michigan, leaving him surviving no children, nor issue, nor widow, and owning a considerable amount of real and personal estate situated in said Wayne and other counties in this State, and as is alleged, having executed a certain paper purporting to be his last will and testament, said paper was by the parties therein named as executors offered for probate in this court on August 8th, 1877, and was on the 9th of November, A. D. 1877, admitted to probate, and thereupon letters testamentary was issued to the parties herein named as executors, to wit, William Jennison, William Adair, William A. Moore, and John Pettie, all of Detroit, Michigan, who have severally taken upon themselves the execution of said alleged will.

The appellants before named, Alexander Fraser, of Cairo, Illinois, and Francis P. Fraser, of Bertram, Iowa, are aggrieved by the order and decree admitting said will to probate, and allowing the same as the last will and testament of said Alexander D. Fraser, deceased,
17 and granting letters testamentary to the executors therein named.

They allege—

First. That as they are informed and believe, the paper is not in fact *and in* will and testament of the said Alexander D. Fraser, deceased.

Second. That at the time of the alleged execution of said paper, the said deceased was not of sound mind.

Third. That the execution of said paper was procured by undue influence.

Fourth. That the said paper does not express the true wishes and intentions of the said deceased in regard to either of these contestants.

Wherefore, for these and other reasons apparent upon the face of said paper, they hereby give notice of appeal, and they do hereby appeal to the circuit court for the county of Wayne, from the order of this court of said 9th day of November, 1877, admitting to probate the said paper as the last will and testament of said deceased, and granting letters testamentary therein. And they pray that all further proceedings in pursuance of the above order and decree appealed from may cease and be determined.

Dated December, 1877.

(S'g'd) ALEXANDER FRASER.
FRANCIS P. FRASER.

Know all men by these present' that we, Alexander Fraser, of Cairo, Illinois, and Francis P. Fraser, of Bertram, Iowa, and Fred. B. Hooper, of Detroit, Michigan, are held and firmly bound unto William Jennison, William Adair, John Pettie and William A. Moore, of Detroit, Michigan, in the sum of five hundred dollars ($500) lawful money
of the United States of America, to be paid to the said William
18 Jennison, William Adair, John Pettie, and William A. Moore, or to their certain attorney, heirs, executors, administrators or assigns, to which payment well and truly to be made, we jointly and severally bind our heirs, executors, and administrators, and each and every of them firmly by these presents; sealed with our seals. Dated the day of December, one thousand eight hundred and seventy-seven.

The condition of this obligation is such that, whereas the above bounden Alexander Fraser and Francis P. Fraser have appealed, from the probate court of Wayne County to the circuit court of said county, from the order and decree of said probate court, dated the 9th day of November, 1877, allowing and admitting to probate a certain paper as the last will and testament of Alexander D. Fraser, deceased:

Now, therefore, if the said Alexander Fraser and Francis P. Fraser shall diligently prosecute their said appeal and pay all such damages and costs as shall be awarded against them in case they shall fail to obtain a re*fu*sal of the said above-mentioned order and decree so appealed from, then 'is obligation to be void, otherwise to be and remain in full force and effect.

(S'g'd) ALEXANDER FRASER. [SEAL.]
FRANCIS P. FRASER. [SEAL.]
F. B. HOOPER. [SEAL.]

Signed, sealed, and delivered in presence of—
GEO. B. REMICK.

I hereby approve of the surety and the penalty in the foregoing bond. Dated January 5th, 1878.

EDGAR O. DURFEE,
Probate Judge, Wayne County.

STATE OF MICHIGAN,
County of Wayne, ss:

19 At a session of the probate court for said county of Wayne, holden at the probate office in the city of Detroit, on Saturday, the fifth day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, Edgar O. Durfee, judge of probate.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

Now come into court Alexander Fraser and Francis P. Fraser, heirs at law of said deceased, and file notice of, together with their reasons for, appeal to the circuit court for said county of Wayne, from the order and decree of November last past, granting probate of the last will and testament of said deceased, and the bond on appeal required by law having been given and having been duly approved and filed in this court—

It is ordered that said appellants give notice of their said appeal, with their reasons therefor, to William Jennison, William Adair, William A.

Moore, and John Pettie, executors of said will, by personally delivering to at least one of said executors a copy of their said notice of and reasons for appeal, on or before the first day of February next, and at least fourteen days before said appeal shall be entered in said circuit court.

(S'g'd) EDGAR O. DURFEE,
Judge of Probate.

20 Probate court for said county.

STATE OF MICHIGAN,
County of Wayne, ss:

I, Thomas B. Jewell, register of probate for said county of Wayne, and acting as clerk of said probate court, do hereby certify that I have compared the foregoing copy of the order of said court, admitting to probate the last will and testament of Alex. D. Fraser, deceased, said will, the notice of appeal of Alexander Fraser from said order, the bond on appeal and the order allowing said appeal, with the original record thereof now remaining in this office, and have found the same to be correct transcript' therefrom, and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said probate court at Detroit, this twenty fifth day of January, A. D. 1878.

PROBATE SEAL, WAYNE COUNTY, MICH. (S'g'd) THOMAS B. JEWELL,
Register of Probate.

21–23 At a session of the circuit court for the county of Wayne, held at the circuit court-room in the city of Detroit, on the fourth day of March, in the year one thousand eight hundred and seventy-eight.

Present, honorable Cornelius J. Reilly, circuit judge.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

Appeal of Alexander Fraser and Francis P. Fraser from the decree of the probate court of Wayne County, Michigan, admitting the last will and testament of said deceased to probate.

In the cause by consent of the attorneys for the respective parties herein given in open court, it is ordered by the court now here that said contestants file their allegations objecting to the probate of the will of said deceased, and cause a copy thereof to be served upon proponents' attorney within twenty day' from this date, and that said proponents file their allegations within twenty days thereafter.

24, 25 State of Michigan, in the circuit court for the county of Wayne. On appeal from the probate court of said court.

In the matter of proving the last will and testament of Alexander D. Fraser, deceased. Appeal by Alexander Fraser and Francis P. Fraser, two of respondents, from the probate court of said county.

William A. Moore, William Jennison, William Adair, and John Pettie, the proponents of said will, do hereby declare and aver that heretofore, to wit, on the 17th day of May, A. D. 1877, at the city of

Detroit, in the county of Wayne and State of Michigan, the testator, of full age and, to wit, past twenty-one years, and sound mind and under no restraint or undue influence whatever, did then and there make and duly execute as required by law his said last will and testament; that said will was made in writing and signed by said testator, and was attested and subscribed in the presence of the said testator by competent witnesses. Proponents further declare and aver that said testator died at Detroit, in the county of Wayne and State of Michigan, on the 2ond day of August, A. D. 1877, and at the time of his decease was an inhabitant of and resident in said first mentioned county. Proponents further aver and allege that said will by the order and decree of the probate court of said county, made on the 9th day of November, 1877, was allowed and admitted to probate; wherefore the said decree of the probate court should be affirmed.

(S'g'd) WILLIAM A. MOORE,
WILLIAM JENNISON,
Att'ys for Proponents.

DETROIT, *March 15th*, 1878.

26, 27 In the circuit court for the county of Wayne.

In the matter of the estate of Alexander D. Fraser, deceased, on appeal of Alexander Fraser and Francis P. Fraser, from the order of the probate court for the county of Wayne, allowing and admitting to probate a paper purporting to be the last will and testament of said deceased.

And now come the said appellants, Alexander Fraser and Francis P. Fraser, by Henry M. Duffield and J. Logan Chipman, their attorneys, and under the order directing the framing an issue in this cause, and in reply to the allegations of William A. Moore, William Jennison, William Adair, and John Pettie, the proponents in this matter, protesting that said proposed will is void in law for illegal provisions, conditions, limitations, and trusts contained therein; nevertheless for answer they aver and say:

First. They demand a trial of the matters set forth in the allegations of the proponents, heretofore filed in this cause on the 15th day of March, instant.

Second. As to the proper writing propounded as the last will and testament of the said Alexander D. Fraser, bearing date the 17th day of May, A. D. 1877, they deny that the same was signed by him and attested and subscribed in manner and form as alleged in the proponent's declaration.

Third. They deny that the time of the alleged execution of said paper writing the said Alexander D. Fraser was of sound mind; on the contrary, they aver that he then was, and up to the time of his death continued to be, of unsound mind, and incapable of making a valid will and testament.

28 Fourth. They aver that if said paper writing was signed by the said Alexander D. Fraser, he was, at the date of its execution, and continued to be up to the time of his death, subject to insane delusions, rendering him not of sound mind, and that said paper writing was signed by him under the influence of such insane delusions.

Fifth. They aver that if said paper writing was executed by the said Alexander D. Fraser, its execution was procured by undue influence, and that it was not in fact his last will and testament.

And the said appellants aver that the matters and things in the said several pleas by them above pleaded are true, and as to each and every of them they prove that they may be required of by the country.

Dated March 23rd, 1878.

(S'g'd) HENRY M. DUFFIELD AND
J. LOGAN CHIPMAN,
Att'ys for Appellants and Respondents.

STATE OF MICHIGAN,
County of Wayne, ss:

John A. Weir being duly sworn, deposes and says that he served a notice, of which the within is a true copy, on William Jennison, esq., in person, on Wednesday, March 27th, 1878.

(S'g'd) JOHN A. WIER.

Subscribed and sworn to before me, this 27th day of March, A. D. 1878.

H. M. KEELER,
Notary Public, Wayne County, Michigan.

(Indorsed:) 19232. In the circuit for the co. of Wayne. In the matter of the estate of Alex. D. Fraser, deceased, on appeal of Alexander Fraser et al. Pleas. Filed March 27, 1878. Edward Monock, dep'y register. Henry M. Duffield and J. Logan Chipman, att'ys for respondents & appellants.

29 In the circuit court for the county of Wayne.

IN THE MATTER OF ESTATE OF ALEXANDER D. FRASER, DECEASED.

On appeal of Alexander Fraser and Francis P. Fraser, from the order of the probate court for the county of Wayne, allowing and admitting to probate a paper purporting to be the last will of said deceased.

And now comes said appellants and respondents, Alexander Fraser and Francis P. Fraser, by Henry M. Duffield and John Logan Chipman, their attorneys, and demand a jury for the trial of this issue of fact joined in this case.

Dated March 25th, 1878.

(S'g'd) HENRY M. DUFFIELD, AND
J. LOGAN CHIPMAN,
Att'ys for Appellants and Respondents.

30 STATE OF MICHIGAN,
County of Wayne, ss:

John A. Weir being duly sworn, deposes and says, that he served a notice, of which the within is a true copy, on William Jennison, esq., giving the same to him in person, on Wednesday, the 27th day of March, 1878.

(S'g'd) JOHN A. WEIR.

Sworn to and subscribed before me this 27th day of March, A. D. 1878.

(S'g'd) H. M. KEELEY,
Notary Public, Wayne County, Michigan.

(Indorsed:) 19232. Circuit court for Wayne County. In the mat-

ter of the estate of Alexander D. Fraser, deceased. Appeal of Alexander Fraser et al. from order of probate court. Demand for jury. (Endorsed:) Filed March 27th, 1878. Edward Winock, dep't. clerk. Henry M. Duffield and J. Logan Chipman, at'ys for appellants.

31 State of Michigan, the circuit court for the county of Wayne.

WILLIAM JENNISON, WILLIAM A. MOORE, John Pettie, and William Adair, proponents & plaintiffs,
vs.
ALEXANDER FRASER AND FRANCIS P. FRASER, contestants & defendants.

To the circuit court for the county of Wayne:

The petition of Alexander Fraser and Francis P. Fraser, the above-named defendants, respectfully shows that a paper writing purporting to be the last will and testament of Alexander D. Fraser, wherein the above-named proponents are named as executors, was admitted to probate in the probate court for the county of Wayne, on the 9th day of March, A. D. 1877.

That said Alexander Fraser and Francis P. Fraser contested the probate of said alleged will in the probate court and duly appealed from the decision of said court to the circuit court for the county of Wayne, that said appeal was duly filed and entered in the said circuit on the fourth day of March, A. D. 1878.

That on said last mentioned day an order the formation of an issue in said cause was duly made by said court, and that on the 28th day of March, A. D. 1878, the declaration of plaintiffs and proponents
32 was filed and served, and on the 27th day of March, A. D. 1878, the pleas of the contestants and defendants were duly served and filed in pursuance of said above-mentioned order and in accordance with the practice of the court, and thereby the issue was made and completed.

That no trial of said cause has been had in said circuit, and that no term of said court has passed since the entry of said cause therein, and this is the first term at which said cause could be tried; that the matter in dispute exceeds exclusive of costs the sum of fifty thousand dollars. That prior to the commencement of proceedings in said matter in the probate court, and ever since and still now petitioners, Alexander Fraser and Francis P. Fraser, are residents and citizens respect*fully*, as follows: Said Alexander Fraser resides in Cairo, and is a citizen of the State of Illinois, and said Francis P. Fraser resides in Bertram, and is a citizen of the State of Iowa; that during and at the time aforesaid and still now each and every one of the above-named proponents, to wit, William Jennison, William A. Moore, John Pettie, & William Adair, is a resident of the eastern district of Michigan, and a citizen of the State of Michigan.

And your petitioners offer herewith a bond with good and sufficient surety for their entering in said circuit court of the United States for the eastern district of Michigan, on the first day of its next session, a copy of the record in this suit, and for paying all costs which may be awarded by said circuit court of said court shall hold that this suit was wrongfully or unlawfully rendered thereto.

And they pray this honorable court to proceed no further herein except to make the order of removal required by law, and to accept

33 the *the* said surety and bond, and to cause the record herein to be removed into s'id circuit of the United States in and for the eastern district of Michigan, and will ever, pray, &c.

(S'g'd) HENRY M. DUFFIELD AND
JOHN LOGAN CHIPMAN,
Attorneys for Petitioners.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, Alexander Fraser, *been* duly sworn, depose and say, that I am one of petitioners in the above-entitled cause. That I have read the foregoing petition and believe the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

ALEXANDER FRASER.

Subscribed by the said Alexander Fraser in my presence, and by him sworn to before me this 30th day of March, 1878, at Cairo in said southern district of Illinois.

(Sg'd) H. H. CANDEE,
U. S. Commissioner, Southern District of Illinois.

To William Jennison and William A. Moore, att'ys for proponents.

Take notice that a petition, of which the foregoing is a copy, has been this day filed in the above-entitled cause, and that the court will be asked to accept the surety in the bond accompanying the petition on Monday, 22ond ins., at the opening of court on said day, or as soon thereafter as counsel can be heard.

Yours, &c.,

(S'gd) HENRY M. DUFFIELD &
J. LOGAN CHIPMAN,
Att'ys for Contestants & Appellants.

DETROIT, *April 17th*, 1878.

34 STATE OF MICHIGAN,
County of Wayne, ss:

John A. Weir, being duly sworn, deposes and says that he served a notice, of which the within is a true copy, on William Jennison, esq., by giving the same to him in person, on Wednesday, the 9th day of April, A. D. 1878.

(S'g'd) JOHN A. WEIR.

Subscribed and sworn to before me this 17th day of April, A. D. 1878.

(S'g'd) H. M. KEELER,
Notary Public, Wayne County, Michigan.

(Indorsed:) 19232. State of Michigan. In the circuit court for the county of Wayne. William Jennison, William A. Moore, John Pettie, and William Adair, for proponents & plaintiffs, vs. Alexander Fraser, Francis P. Fraser, contestants and defendants. Petition & notice of removal to United States circuit court, eastern district of Michigan. Filed April 17th, 1878. Martin Vrooman, dep. clerk. Henry M. Duffield and J. Logan Chipman, att'ys for petitioners.

35 At a session of the circuit court for the county of Wayne, held at the circuit court-room in the city of Detroit on the sixth day of May, in the year one thousand eight hundred and seventy-eight.

Present, honorable Cornelius J. Reilly, circuit judge.

42 (Indorsed:) 19232. State of Michigan, the circuit court for the county of Wayne. In the matter of the estate of A. D. Fraser, deceased. Notice to amend record of appeal with affidavit. Notice affidavit. Certified copy of appearance in probate court. Filed May 10th, 1878. Edward Minock, deputy clerk.

43 In the probate court for Wayne County.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

To said probate court:

Notice is hereby given that the undersigned are authorized and do hereby appear for Ellis Fraser, Alexander Fraser, Elizabeth Calvin, Sophia Redden, Mary Calvin, Francis P. Fraser, and John Fraser, who are heirs at law of said Alexander D. Fraser, deceased, and that said heirs at law intend to and do contest the probate of the paper herein filed purporting to be the last will of said Alexander D. Fraser, deceased, on the grounds, among others, that said Alexander D. Fraser was not at the date of the alleged execution thereof, of sound mind and memory; that he, at that date, did not have mental capacity to make a will; that the said paper was procured to be executed by undue influence, and that the same was not executed and attested in the manner required by the said statute.

Dated Oct. 29, 1'77.

(S'g'd) HENRY M. DUFFIELD, AND
J. LOGAN CHIPMAN,
Attorneys for Contestants above named.

44 Filed October 19th, 1877. (S'g'd) J. B. Jewell, register.

45 STATE OF MICHIGAN,
County of Wayne, ss:

Probate court for said county.

I, Thomas B. Jewell, register of probate, for said county, and acting as clerk of said probate court, do hereby certify that I have compared the foregoing copy of the notice (of certain heirs at law of Alexander D. Fraser, deceased,) of their objections to the probate of his last will and testament, and of their intention to contest the probate thereof, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record, and I further certify that said notice was filed in said court on the 29' day of October, A. D. 1877.

In testimony whereof I have hereunto set my hand and affixed the seal of said probate court, at Detroit, this eighteenth day of April, A. D. 1878.

[SEAL.] (S'g'd) THOMAS B. JEWELL,
Register of Probate.

(Endorsed:) Filed June 4, 1878. A. Mandell, clerk.

46 (Indorsed:) 19232. Probate court. Estate of Alexander D. Fraser, deceased. Exemplification of record as amended. Filed May 10th, 1878. Edward Minock, deputy clerk.

47 IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRAZER, DECEASED.

Exemplification of record.—Claim and notice of an appeal.—Allegations & objections.—Order for same.—Declaration of proponents.—Pleas.—Demand for jury.—Petition and notice of removal to U. S. court.—Journal entries.—Order to amend record on appeal.—Affidavit of Wm. Jennison.—Notice to amend record.—Exemplification of record as amended.

STATE OF MICHIGAN,
Wayne County, ss:

I, Jeremiah Sheahan, register of the circuit court for the county of Wayne, in chancery, do hereby certify that the above and foregoing is a true and correct copy of above-entitled paper entered in the above-entitled cause by said court, as appears of record in my office; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Detroit, this first day of June, A. D. 1878.

[SEAL.] (S'g'd) JEREMIAH SHEAHAN,
Register in Chancery,
By MARTIN A. VROOMAN,
Dep't. Reg's.

48, 49 *Motion to dismiss & to remand case to Wayne circuit court.*

The circuit court of the United States for the eastern district of Michigan.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

On appeal of Alexander Fraser and Francis P. Fraser from the order of the probate court for the county of Wayne allowing and admitting to probate a paper purporting to be the last will and testament of said deceased, on removal from the circuit court for the county of Wayne, State of Michigan.

And now come William A. Moore, William Jennison, John Pettie, and William Adair, the proponents of the alleged will of said Alexander D. Fraser, deceased, and move the court that an order may be entered in the above-entitled cause dismissing the same for want of jurisdiction in this court to entertain or hear the same, and that the record and proceedings therein be remanded to the said circuit court for the county of Wayne, for the following reasons:

First. That the controversy sought to be removed is the probate of a will, and is not such an action as the said United States circuit court can acquire jurisdiction of under any of the acts of Congress of the United States pertaining to the removal of causes from State courts.

Second. That if this court can exercise jurisdiction in such
50 cases, the petition and bond required by the act of Congress on removal should have been presented and filed in the State court of original jurisdiction, to wit, the probate court for the county of Wayne, before or at the term of said court at which said cause could first have been tried. And that said appellants, having submitted themselves by written objection to the jurisdiction of said court and gone to trial upon

the merits, it is too late to first apply for a removal to the circuit court of the United States after an appeal taken from the order of said probate court to the State appellate court.

Third. This court has no jurisdiction of said cause, because by the record in said probate court, as well as the circuit court for the county of Wayne, it appears that the said proponents at the time of their appearance in said probate court, as well as the filing of said petition, were, and now are, citizens of the State of Michigan; that four of the contestants of said will in the probate court, to wit, Ellis P. Fraser, Mary Calvin, Elizabeth Calvin, and Sophia Redden, were at said mentioned times, and now are, also citizens of Michigan; and that the appellants who seek to remove this cause were, and now are, citizens of Illinois and Iowa, respectively.

Fourth. Because, while all the said contestants appealed from the said order of the said probate court, yet only two of them seek to remove said cause to this court, and which is in effect the removal of but part of the cause, and which the acts of Congress do not permit except in specified cases.

Fifth. The petition is not entitled in any cause pending in the State court.

51 Sixth. The said petition is not signed by the petitioners.

Seventh. The record of said cause shows no jurisdiction in this court.

Eight. This motion is based on the petition of removal, the record and files in said cause, and the affidavit of proponents.

(S'g'd) WM. A. MOORE,
WM. JENNISON,
Solicitors for Proponents of the Will.

DETROIT, 1878.

52, 53 In the circuit court of the United States for the eastern district of Michigan.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

On motion to remand the record removed from the circuit court for the county of Wayne by Alexander and Francis P. Fraser.

EASTERN DISTRICT OF MICHIGAN, *ss*:

William Jennison, being duly sworn, deposes and says, that he is one of the solicitors of the proponents of the will of said Alexander D. Fraser, deceased. That said will was offered to probate in the probate court for the county of Wayne, August 8th, 1877.

That Oct. 29, 1877, Alexander and Francis P. Fraser, together with Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, & Sophia Redden filed *three* joint appearance in said estate in said court by H. M. Duffield & J. Logan Chipman, their solicitors, as contestants with specific objections.

That the said probate court, after a contested hearing, made an order admitting said will to probate.

That said Alexander and Francis P. Fraser took their joint appeal from said order to the circuit court for the county of Wayne. That said remaining four contestants were then, and now are,

citizens of Michigan, and that they took their joint appeal from said order to said circuit court for Wayne County, and were all
54 represented by the said solicitors. And that said appeals are now pending in said State appellate court. That the said appellate court made an order for an issue of fact to be made in each of said appeals. And thereupon the same issue was formed in each of said appeals, to wit: the validity of said alleged will.

That this deponent further says, that the record attempted to be removed to this court by said appellants does not contain the entire record of this cause, as an inspection of the record now here will show, and this deponent further says, that an order has been maid' by said Wayne circuit court consolidating said two appeals.

(S'g'd) WM. JENNISON.

Sworn and subscribed before me this 10th day of June, 1878.

(S'g'd) CHARLES P. BURTON,
Notary Public, Wayne Co., Michigan.

55 To Henry M. Duffield, J. Logan Chipman, esq's, solicitors for said appellants in the foregoing entitled cause:

GENT:—Please take notice that a motion in said case, of which the foregoing is a copy, was entered in the motion-book in the office of the clerk of said court, on the 8th day of June, 1878, and that the same will be called up for hearing on Wednesday, the 12th day of June, 1878, at the opening of court on said day, or as soon thereafter as counsel can be heard. Said motion is based on the petition for removal, the files and record in said cause, and the affidavit of Wm. Jennison, one of the solicitors for the proponents of the will of said deceased, a copy of which is hereto annexed.

Detroit, June 8th, 1878.

(S'g'd) WM. JENNISON,
WM. A. MOORE,
Sol. for Proponents.

(Endorsed:) Filed June 8, 1878, A. Mandell, clerk.

56 (Indorsed:) 6286. The circuit court of the U. S. for the E. D. of Mich. Affidavit in the matter of the estate of A. D. Fraser, deceased. Motion to remand & affidavit, June 8, '78. Filed June 8th, 1878. (Sig'd) A. Mandell, c'k. Wm. Jennison & Wm. A. Moore, sol. for proponents.

57 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Thursday the thirteenth day of June, in the year one thousand eight hundred and seventy-eight.

Present, honorable Henry B. Brown, district judge, & honorable Noah H. Swayne, associate justice of the Supreme Court.

Order that certiorari issue.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

A motion having been heretofore made by the proponents of the will of said deceased, to remand the record in this cause to the circuit court

for the county of Wayne & State of Michigan, and the same now coming on to be heard, and it appearing to the satisfaction of this court by affidavit that the entire record of said cause is not before this court, on motion of William Jamison, attorney for said proponent, it is ordered that a writ of certiorari do issue out of and under the seal of this court to the said circuit court requiring that so much of the entire record in said circuit court as relates to the probate of the will of said deceased as is not now before this court, including the records of all the appeals taken from the order of the probate court for Wayne County, Michigan, admitting said will to probate, by whomsoever
58 instituted, be returned to this court with all convenient speed, under the certificat' of the clerk of said circuit court for the county of Wayne.

(Indorsed:) 6286. Circuit court U. S. eastern district of Michigan. In the matter of the estate of Alexander D. Fraser, deceased. Draft order entered & filed June 13th, 1878. A. Mandell.

59 *Writ of certiorari.*

The President of the United States of America to the judge of the circuit court for the county of Wayne:

Whereas it hath been represented to the circuit court of the United States for the eastern district of Michigan that the probate court for the county of Wayne, Michigan, made an order on the 9th day of November, 1877, admitting to probate a paper purporting to be the last will and testament of Alexander D. Fraser, deceased, and that Alexander Fraser and Francis P. Fraser made their joint appeal from said order to the circuit court for the county of Wayne, and that they were, and now are, citizens of Illinois and Iowa respectively, and that Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden made their joint appeal from said order to said court, and that they were then, and now are, citizens of Michigan. That said Alexander and Francis P. Fraser duly filed in the said State court their petition for the removal of said cause into the said circuit court of the United States, and filed with said petition the bond with surety required by the act of Congress of March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from States courts, and for other purposes," and that the clerk of the State court mentioned has failed to prepare for the said petitioner for the removal of said cause a full and complete copy of the entire record therein, so that the said circuit court may proceed therein. Herein fail not.

60, 61 You are, therefore, hereby commanded that you forthwith certify, or cause to be certified, to the said circuit court of the United States for the eastern district of Michigan, so much of the entire record in said court as related to the probate of the will of said deceased as is not now before said United States court, including the record of all the appeals taken from the order of the probate court for the county of Wayne, admitting said will to probate by whomsoever instituted under the certificate of the clerk of said circuit court for the county of Wayne.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court hereto affixed at Detroit this 17th day of June, A. D. 1878.

[SEAL.] (S'g'd) ADDISON MANDELL, *Clerk.*

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify & return that on the 18th day of June, 1878, I served the within writ on the Wayne County circuit court, by delivering a true copy thereof personally, at Detroit, in said district, to Jeremiah Sheahan, clerk of said circuit court.

256. (S'g'd.) S. S. MATHEWS,
U. S. Marshal, Eastern District of Mich.

62 (Indorsed:) 6286. The circuit court of the United States for the eastern district of Michigan. In the matter of the estate of A. D. Fraser, dec's'd. Writ of cert'orari to the judge of the circuit court for the co. of Wayne to send up record. Returned & filed June 18, 1878. A. Mandell, c'k. Wm. Jennison & Wm. A. Moore, sol'c'rs for proponent.

63 *Additional transcript.*

STATE OF MICHIGAN:

In the probate court for the county of Wayne.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

To the judge of probate of the county of Wayne:

Ellis P. Fraser, of White Pigeon, Michigan, Mary Colvin, of Buchanan, Michigan, Elizabeth Colvin, of Buchanan, Michigan, Sophia Redden, of Buchanan, Michigan, respectfully represent that they are nephews and nieces of the above-named Alexander D. Fraser, deceased, being children of Peter Fraser, deceased, who was a brother of said Alexander D. Fraser, deceased, and are heirs at law of said Alexander D. Fraser, deceased; that said Alexander D. Fraser deceased in the county of Wayne, Michigan, leaving him surviving no children, nor issue, nor widow, and owning a considerable amount of real and personal estate, situated in said Wayne and other counties in this State, and, is alleged, having executed a certain paper purporting to be his last will and testament, said paper was by the parties therein named as executors offered for probate in this cause on August 8th, 1877, and was on the 9th day of November, A. D. 1877, admitted to probate, and thereupon letter testamentary were issued to the parties therein named as executors, to wit, William Jennison, William Adair, William Moore, and John Pettie, all of Detroit, Michigan,

64 who have severally taken upon themselves the execution of said alleged will; the appellees above-named, Mary Colvin, Elizabeth Colvin, Sophia Redden, Ellis P. Fraser are aggrieved by the order and decree admitting said will to probate, and allowing the same as the last will and testament of Alexander D. Fraser, deceased, and granting letters testamentary to the executors therein named. They allege—

First. That, as they are informed and believe, the said paper is not in fact and in law the last will and testament of the said Alexander D. Fraser, deceased.

Second. That at the time of the alleged execution of said paper the said deceased was not of sound mind.

Third. That the execution of the said paper was procured by undue influence.

Fourth. That the said paper does not express the true wishes and

intentions of the said deceased in regard to either of these contestants.

Wherefore, for these and other reasons apparent upon the face of said paper, they hereby give notice of appeal, and they do hereby appeal, to the circuit court for the county of Wayne from the order of this court of said 9th day of November, 1877, admitting to probate the said paper as the last will and testament of said deceased, and granting letters testamentary thereon, and they pray that their said appeal may be allowed.

And they pray that all further proceeding in pursuance of the above order and decree appealed from may cease and be determined.

Dated December, 1877.

(Signed) ELLIS P. FRASER.
MARY COLVIN.
ELIZABETH COLVIN.
SOPHIA REDDEN.

HENRY M. DUFFIELD and
J. LOGAN CHIPMAN,
Attornies and of Counsel for Appellants.

65 STATE OF MICHIGAN,
County of Wayne, ss:

John A. Weir, being duly sworn, deposes and says that he served a notice on the 22ond day of January, 1878, of which the within is a true copy, on William Jennison, by leaving the same with him in person.

(S'g'd) JNO. A. WEIR.

Subscribed and sworn to before me this 29th day of January, A. D. 1878.

GEO. B. REMICK,
Notary Public, Wayne County, Mich.

66 (Indorsed:) No. 19231. In the probate court of Wayne County. In the matter of the estate of Alexander D. Fraser, deceased. Claim and notice of appeal of Ellis P. Fraser.

To William Jennison et al.:

Take notice that the within is a copy of the notice of appeal of Ellis Fraser et al., within named.

Dated Jan. 26th, 1878.

HENRY M. DUFFIELD AND
J. LOGAN CHIPMAN,
Att'y and of Counsel for Appellants.

Filed March 4th, A. D. 1878. Jeremiah Sheahan, clerk.

67 In the name of God, amen.

I, Alexander D. Fraser, of the city of Detroit, State of Michigan, counsellor at law, do make and declare this my last will and testament in manner and form following:

I resign my soul into the hands of Almighty God, hoping and believing in a remission of my sins by the merits and mediation of Jesus Christ; and my worldly estate I give, devise, and bequ'ath as follows:

First. I give and bequeath unto my nieces Margaret and Isabella Davidson, both of Inverness, Scotland, & to the survivor of them, the sum of four thousand dollars, the interest of which shall be quarterly

or semi-annually transmitted by my executors or trustees to them as has been heretofore been done by me. This sum I estimate to be about the amount in which I am now indebted to them for monies to which they succeeded through their mother's last will and testament, and which sum therefore I bequeath to them in full payment & discharge thereof, and on that condition. The amount transmitted by me heretofore quarterly or semi-annually has been seventy or forty pounds sterling, and should the interest accruing from said sum be inadequate to pay the premium of such amount, the residue may be paid from my estate. I enjoin upon my trustees or executors to be prompt and punctual in the transmission of this annuiety.

Second. I give and bequeath to another niece, Ann Monroe, of Inverness aforesaid, for her own use and benefit, and excluding the
, the sum of five hundred dollars.

68 Third. I give and bequeath to Mrs. Octavia Seymour, of Detroit, the sum of one thousand dollars, in consideration of her constant attention and kindness to me during my illness.

Fourth. I give and bequeath to William Adair and John Pettie, of Detroit, in trust for the Saint Andrew's Society of Detroit, the sum of five hundred dollars, which shall be permanently invested by said society, when it shall have become duly incorporated under the laws of this State, the interest of which shall be regularly drawn and added to the benevolent fund of the society, and appropriated in all future time to the relief of any of the natives of Scotland living here who may be in necessitous circumstances, and under such regulations as the society may make from time to time.

Fifth. I give and bequeath to the Rev. A. Fraser, minister of the parish of Kirkhill, Aird (Free Church), Scotland, living at Baysay, the sum of fifty pounds sterling for the poor of his parish, to be appropriated under his direction.

Sixth. I hereby bequeath to my friend Robert McClelland the Chatham correspondence, in four volumes, in testimony of our uniform friendship.

Seventh. I give and bequeath to Mrs. Julian Williams the sum of one hundred dollars, to be appropriated by her to the purchase of a ring, to be kept as a token of our uniform friendship.

Eight. As to all and singular my real and personal estate which I now own, or may own at the time of my death, & wheresoever situated, and of what nature soever, I hereby give, devise, and bequeath to William A. Moore, William Jennison, William Adair, and John Pettie, all
of Detroit, Michigan, and their heirs & assigns forever and
69 their heirs & administrators respectively, not already disposed of, but in trust only and for the uses and purposes hereinafter mentioned, & not otherwise.

1st. The trustees, or a majority, or any two of them, shall take charge of all of said real and personal property, and shall pay all dues and public burdens thereon, & sell & dispose of the same at such time & place and on such terms as to them shall seem proper; they shall lay out my property on the "Chene farm," Detroit, in lots so that those lying between Woodbridge and Franklin streets may front on Chene street, and of such size as they shall think fit.

2ond. My said trustees and executors are especially enjoined to pay all care and attention to my beloved wife, Caroline, whose health has suffered in consequence of my illness. This disposition is made to relieve her from all unnecessary care and anxiety in the settlement of my estate. My said trustees & executors shall provide all comforts for her

that she may possibly require, and to furnish her with such means that she may at any time need, and she may select her own residence. This *and* attention I expect she shall receive during her natural life; it is my desire & intention that my said wife should be maintained & should live in the manner that she has been accustomed to.

3rd. None of the legacies above specified shall be paid until my said real estate, or an adequate portion thereof, shall be sold and paid for, except the annuity payable to my said two nieces, Margaret and Isabella Davidson.

70 4th. I direct that my trustees & executors shall procure and erect on my lot thirty (30), in Elmwood Cemetery, a monument of Scotch granite to my family, and I do hereby constitute and appoint the said William A. Moore, William Jennison, William Adair, and John Pettie, or any two or more of them, to be the executors of this my last will and testament, and I dispense with any executor's or administrator's or trustee's bond, hereby revoking all former wills by codicils by me made. Finally, on the demise of my said wife and the settlement of my estate, and the payment of all expenses connected therewith, I direct my said trustees and executors to transmit to my said two nieces last above mentioned, Margaret and Isabella Davidson, whatever balance or balances that may remain on their hands, it being hereby my intention to give and devise to them whatever surplus that may remain undisposed of to their own use & benefit, and should any of said real estate remain undisposed of, to convey the same to them or the survivors of them. But it is my intention that in case of the death of both of my said nieces before the death of my said wife, then their share shall go to their sister Ann Monroe, of Inverness.

In witness whereof I have hereunto set my hand & seal, at Detroit, this seventeenth day of May, in the year of our Lord one thousand and eight hundred and seventy-seven.

A. D. FRAZER. [SEAL.]

Signed, sealed, published, & declared by said testator as and for his last will and testament, in presence of us, who, at his request, in
71 his presence & in the presence of each other, have subscribed our names as witnesses hereto on the said seventeenth day of May, A. D. 1877.

ROBERT MCCLELLAND, *of Detroit, Mich.*
D. BETHUNE DUFFIELD, *of Detroit, Michigan.*
WILLIAM JENNISON, " "
LEVI BISHOP, " "
JOHN PETTIE, " "

STATE OF MICHIGAN,
County of Wayne, ss:

At a session of the probate court for said county of Wayne, holden at the probate office, in the city of Detroit, on Friday, the 9th day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, Hon. Edgar O. Durfee, judge of probate.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

The tenth day of September, A. D. 1877, having been appointed for proving the instrument heretofore delivered into this court, purporting

to be the last will and testament of said deceased, and parties having appeared to contest the probate thereof, and said cause having been continued from time to time, and Robert McClelland, D. Bethune Duffield, William Jennison, Levi Bishop, and John Pettie, the subscribing witnesses to said instrument, having appeared in court, and having testified that said instrument was signed by the said Alexander
72 D. Fraser, and attested and subscribed in his presence by four competent witnesses, and that the said testator was then of sound mind;

And it appearing to the court, by due proof on file, that notice of the time and place appointed for proving said instrument has been given as required by law, and it further appearing to the court that said testator was of full age at the time of executing said instrument; that at the time of his decease he was an inhabitant of said county of Wayne, and that said instrument is duly proved and ought to be allowed as the last will and testament of said deceased;

It is ordered and decreed that said instrument be, and the same is hereby, allowed, and that it have full force and effect as the last will and testament of said deceased; and it is further ordered that the execution of said will be com'itted and the administration of said estate be granted to William A. Moore, William Jennison, William Adair, and John Pettie, executors; and that upon their giving bonds in the penal sum of one thousand dollars, with sufficient sureties, and the same being duly approved, letters testamentary do issue to them.

(S'g'd) EDGAR O. DURFEE,
Judge of Probate.

73 State of Michigan, in the probate court for the county of Wayne.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

To the Judge of Probate of the county of Wayne:

Ellis P. Fraser, of White Pigeon, Michigan; Mary Colvin, of Buchanan, Michigan; Elizabeth Colvin, of Buchanan, Michigan; Sophia Redden, of Buchanan, Michigan, respectfully represent that they are nephews and nieces of the above*d*-named Alexander D. Fraser, deceased, being children of Peter Fraser, deceased, who was a brother of said Alexander D. Fraser, deceased, and are heirs at law of said Alexander D. Fraser, deceased; that said Alexander D. Fraser, deceased, in the county of Wayne, Michigan, leaving him surviving no children, nor issue, nor widow, and owning a considerable amount of real and personal estate situated in said Wayne and other counties in this State; and, as is alleged, having executed a certain paper purporting to be his last will and testament, said paper was, by the parties therein named as executors, offered for probate in this court on August 8th, 1877, and was, on the 9th day of November, A. D. 1877, admitted to probate, and thereupon letters testamentary were issued to the parties therein mentioned as executors, to wit: William Jennison, William Adair, William A. Moore, and John Pettie, all of Detroit, Michigan, who have severally taken upon themselves the execution of said alleged will, the appellees above-named, Mary Colvin, Elizabeth Colvin,
74 Sophia Redden, Ellis P. Fraser, are aggrieved by the order and decree admitting said will to probate and allowing the same as the last will and testament of said Alexander D. Fraser, deceased, and granting letters testamentary to the executors therein named. They allege, first: That as they are informed and believe the paper is not

in fact and in law the last will and testament of the said Alexander D. Fraser, deceased.

Second. That the time of the alleged execution of said paper the said deceased was not of sound mind.

Third. That the execution of the said paper was procured by undue influence.

Fourth. That the said paper does not express the true wishes and intentions of said deceased in regard to either of these contestants.

Wherefore, for these and other reasons apparent upon the face of said paper, they hereby give notice of appeal, and they do hereby appeal to the circuit court for the county of Wayne from the order of this court of said 9th day of November, 1877, admitted to probate the said paper as the last will and testament of said deceased, and granting letters testamentary thereon; and they pray that their said appeal may be allowed, and they pray that all further proceedings in pursuance of the above order and decree appealed from may cease and be determined. Dated Monday, December 31st, 1877.

(S'g'd) ELLIS P. FRASER.
MARY COLVIN.
ELIZABETH COLVIN.
SOPHIA REDDEN.

HENRY M. DUFFIELD and
J. LOGAN CHIPMAN,
Attorneys and Counsel for Appellants.

75 Know all men by these presents that we, Ellis P. Fraser, of White Pigeon; Mary Colvin, Elizabeth Colvin, and Sophia Redden, of Buchanan, Michigan; and Fred B. Hooper of Detroit, Michigan, are held and firmly bound unto William Jennison, William Adair, John Pettie, and William A. Moore, of Detroit, Michigan, in the sum of five hundred dollars ($500.00) lawful money of the United States of America, to be paid to the said William Jennison, William Adair, John Pettie, and William A. Moore, or to their certain attorney, heirs, executors, administrators, or assigns, to which payment well and truly to be made, we jointly and severally bind our heirs, executors, and administrators, and each and every of them firmly by these presents. Sealed with our seals. Dated the 31st day of December, one thousand eight hundred and seventy-seven.

The condition of this obligation is such that, whereas the above bounden Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden have appealed, from the probate court of Wayne to the circuit court of said county, from the order and decree of said probate court, dated the 9th day of November, 1877, allowing and admitting to probate a certain paper as the last will and testament of Alexander D. Fraser, deceased:

Now, therefore, if the said Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden shall diligently prosecute their said appeal and pay all such damages and costs as shall be awarded against them in case they shall fail to obtain a reversal of the said abovementioned order and decree so appealed from, then this obligation to be void, otherwise to be and remain in full force and effect.

(S'g'd) ELLIS P. FRASER. [L. S.]
76 MARY COLVIN. [L. S.]
ELIZABETH COLVIN. [L. S.]
SOPHIA REDDEN. [L. S.]
F. B. HOOPER. [L. S.]

Signed, sealed, and delivered in presence of—
GEO. B. REMICK.

I hereby approve of the surety and the penalty in the foregoing bond. Dated Jan'y 5th, 1878.

(S'g'd) EDGAR O. DUREEE,

Judge of Probate.

STATE OF MICHIGAN,
County of Wayne, ss:

At a session of the probate court for said county of Wayne, holden at the probate office, in the city of Detroit, on Saturday, the fifth day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, Edgar O. Durfee, judge of probate.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

Now comes into court Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden, heirs at law of said deceased, and file notice of, together with their reasons for, appeal to the circuit court for said county of Wayne, from the order and decree of this court, made on the ninth day of November last past, granting probate to the last will and testament of said deceased, and the bond on appeal required by law having been given, and having been duly approved and filed in this court, it is ordered that said appellants give notice of their said appeal, with their reasons therefor, to William Jennison, William Adair, William A. Moore, and John Pettie, executors of said will, by personally delivering to at least one of the said executors a copy of their
77 said notice of and reasons for appeal on or before the first day of February next, and at least fourteen days before said appeal shall be entered in said circuit court.

(S'g'd) EDGAR O. DURFEE,

Judge of Probate.

STATE OF MICHIGAN,
County of Wayne, ss:

Probate court for said county.

I, Thomas B. Jewell, register of probate for said county, and acting as clerk of said probate court, do hereby certify that I have compared the foregoing copy of the order of said court admitting to probate the last will and testament of Alex. D. Fraser, deceased, said will, the notice of appeal of Ellis P. Fraser et al., from said order, the bond given on said appeal & the order of said court allowing said appeal, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of said probate court, at Detroit, this twenty-fifth day of January, A. D. 1878.

[SEAL.] (S'g'd) THOMAS B. JEWELL,

Register of Probate.

78, 79 MARCH 4TH, 1878.

At a session of the circuit court for the county of Wayne, con-

tinued and held at the circuit court room, in the city of Detroit, on the fourth day of March, in the year one thousand eight hundred and seventy-eight.

Present, Hon. Cornelius J. Reilly, circuit judge.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED. } 19232.

Appeal of Alexander Fraser and Francis P. Fraser from the decree of the probate court of Wayne County, Michigan, admitting the last will and testament of said deceased to probate.

In this cause, on consent of the attorneys for the respective parties herein given in open court, it is ordered by court now here that the said contestants file these allegations objecting to the probate of the will of said deceased, and cause a copy thereof to be served upon proponents' attorney within twenty days from this date, and that said proponents file their allegations within twenty days thereafter.

(S'g'd) CORNELIUS J. REILLY,
Circuit Judge.

80 MARCH 4TH, 1878.

At a session of the circuit court for the county of Wayne, continued and held at the circuit court-room, in the city of Detroit, on the fourth day of March, in the year one thousand eight hundred and seventy-eight.

Present, Hon. Cornelius J. Reilly, circuit judge.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED. } 19231.

Appeal of Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden from the decree of the probate court of Wayne County, Michigan, admitting the last will and testament of said deceased to probate.

In this cause, by consent of the attorneys for the respective parties hereto, given in open court, it is ordered by the court now here that the contestants in this cause file their allegations objecting to the probate of the last will and testament of said deceased, and cause a copy thereof to be served upon proponent's attorney within twenty days from this date, and that said proponents file their allegations in this cause within twenty days thereafter.

(S'g'd) CORNELIUS J. REILLY,
Circuit Judge.

81 State of Michigan. In the circuit court for the county of Wayne. On appeal from the probate court of said county.

In the matter of proving the last will and testament of Alexander D. Fraser, deceased, on appeal by Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden, four of respondents, from the probate court of said county.

William A. Moore, William Jennison, William Adair, and John Pettie, the proponents of said will, do hereby declare and aver that here-

tofore, to wit, on the first day of May, A. D. 1877, at the city of Detroit, in the county of Wayne, and State of Michigan, the testator being of full age, to wit, past twenty-one years, and sound mind, and under no restraint or undue influence whatever, did then and there make and duly execute, as required by law, his said last will and testament; that said last will was made in writing and signed by said testator, and was attested and subscribed in the presence of the said testator by two competent witnesses.

Proponents further declare and aver that said testator died in Detroit, in the county of Wayne, and State of Michigan, on the 2ond day of August, A. D. 1877, and at the time of his decease was an inhabitant of and resident in said first-mentioned county.

Proponents further aver and allege that said will, by the order
82 and decree of the probate court of said county made on the 9th day of November, A. D. 1877, was allowed and admitted to probate, wherefore the said decree of the probate court should be affirmed.

Detroit, March 1st, 1878.

(S'g'd) WILLIAM JENNISON,
WILLIAM A. MOORE,
Att'ys for Proponents.

(Endorsed:) Filed March 1st, 1878. Edward Munvock, d'p'y cl'k.

83 In the circuit court for the county of Wayne.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

On appeal of Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden, from the order of the probate court for the county of Wayne, allowing and admitting to probate a paper purporting to be the last will and testament of said deceased.

And now come the said appellants, Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden, by Henry M. Duffield and J. Logan Chipman, their attorneys, and under the order directing the framing of an issue in this cause, and in reply to the allegations of William A. Moore, William Jennison, William Adair, and John Pettie, the proponents in this matter, protesting that said supposed will is void in law for illegal provisions, conditions, limitations, and trusts contained therein; nevertheless for answer they aver and say—

First. They demand a trial of the matters set forth in the allegations of the proponents, heretofore filed in this cause on the 13th day of March, instant.

Second. As to the paper writing propounded as *as* the last will and testament of the said Alexander D. Fraser, deceased, bearing date the 17th day of May, A. D. 1877, they deny that the same was signed by him and attested and subscribed in manner and form as alleged in the proponents' declaration.

84 Third. They deny that at the time of the alleged execution of said paper writing the said Alexander D. Fraser was of sound mind; on the contrary, they aver that he then was, and up to the time of his death continued to be, of unsound mind, and incapable of making a valid will and testament.

Fourth. They aver that if said paper writing was signed by the said Alexander D. Fraser, he was, at the date of its execution, and contin-

ned to be up to the time of his death, subject to insane delusions, rendering him not of sound mind, and that said paper writing was signed by him under the influence of such insane delusions.

Fifth. They aver that if said paper writing was executed by the said Alexander D. Fraser, its execution was procured by undue influence, and that it was not in fact his free act and will, and is not in fact his last will and testament.

And that said appellants aver that the matters and things in the said several pleas by them above pleaded are true, and as to each and every of them they pray that they may be enquired of by the country.

Dated March 23rd, 1878.

(S'g'd) HENRY M. DUFFIELD AND
J. LOGAN CHIPMAN,
Attorneys for Appellants and Respondents.

85 In the circuit court for the county of Wayne.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

On appeal of Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden from the order of the probate court for the county of Wayne, allowing and admitting to probate a paper purporting to be the last will of said deceased.

And now comes the said appellants and respondents, Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden, by Henry M. Duffield and J. Logan Chipman, their attorneys, and demand a jury for the trial of the issue of fact joined in this cause.

Dated March 25th, 1878.

(S'g'd) HENRY M. DUFFIELD AND
J. LOGAN CHIPMAN,
Att'ys for App'l't & Respondents.

86 STATE OF MICHIGAN,
County of Wayne, ss:

John A. Weir, being duly sworn, deposes and says that he served a notice, of which the within is a true copy, on William Jennison, esq., by giving the same to him in person, on Wednesday, the 27th day of March, 1878.

(S'g'd) JNO. A. WIER.

Subscribed and sworn to before me this 27th day of March, A. D. 1878.

(S'g'd) H. M. KEELER,
Notary Public, Wayne County, Mich.

87 JUNE 10TH, 1878.

At a session of the circuit court for the county of Wayne, continued and held at the circuit court room, in the city of Detroit, in said county, on the tenth day of June, in the year one thousand eight hundred and seventy-eight.

Present, Hon. Cornelius J. Reilly, circuit judge.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED. } 19232.

On appeal of Alexander Fraser and Francis P. Fraser, also of Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden, from the order of the probate court for the county of Wayne admitting to probate a paper purporting to be the last will and testament of said deceased, together with the issues ordered therein.

A motion having been heretofore made to consolidate the two above-named appeals, and it appearing that the said Alexander Fraser and Francis P. Fraser, and the said Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Redden, duly appealed from the order of the probate court, admitting to probate a paper purporting to be the last will and testament of said Alexander D. Fraser, and that an issue of fact was ordered to be formed in each of said two appeals; and it further appearing that the said appeals were taken from the said order, and that said issues ordered in said two appeals were the same in each case, and that the issue heard in the said probate court was
88 the same as the order in said appeals: On motion of William Jennison and William A. Moore, of counsel for proponents of said will, and appellees, ordered, that said two records of appeal, and said two issues ordered therein, be consolidated into one action.

(S'g'd) CORNELIUS J. REILLY,
Circuit Judge.

89 IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED. }

Appeal of Ellis P. Fraser et al., from order of probate court, &c.

To the circuit court of the United States for the eastern district of Michigan.

In obedience to a writ of certiorar*o* issued out of said court, in the above-entitled cause, on the 17th day of June, A. D. 1878, directed to the judge of the circuit court for the county of Wayne, I, Jeremiah Sheahan, clerk of said last-named court, do hereby return that the papers hereto attached are true copies of all the papers and orders constituting the entire record in the circuit court for the county of Wayne relating to the probate of the will of the said deceased, except such as are now before said United States court; and that the above, together with that portion now before said United States court, includes the record of all the appeals taken from the order of the probate court for the county of Wayne, admitting said will to p robate, taken by any and all persons.

(S'g'd) JEREMIAH SHEAHAN, *Clerk.*
By MARTIN A. VROOMAN, *Dp'y Clerk.*

STATE OF MICHIGAN,
Wayne County, ss:

I, Jeremiah Sheahan, clerk of the circuit court for the county of Wayne, do hereby certify that the above and foregoing is a true and correct copy of claim and notice of appeal, exemplification of record, journal entries, declaration of proponents, plea, & demand for jury, entered in the above-entitled cause by said court, as appears of record

in my office. That I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Detroit, this eighteenth day of June, A. D. 1878.

(S'g'd) JEREMIAH SHEAHAN,
[SEAL.] By MARTIN A. VROMAN,
Dep. Reg. & Clerk.

90 (Endorsed:) Rec'd & filed in U. S. circ't clerk's office, on this 18th day of June, 1878. A. Mandell, clerk, by Jno. Graves, dep'y clk.

91 *Judge Swayne's opinion.*

IN MATTER OF THE WILL OF ALEXANDER D. FRASER, DECEASED.

Motion to remand the case from the circuit court of the United States for the eastern district of Michigan to the circuit court of Wayne County, in that State, from which latter court it was removed to the former.

The case was fully and ably argued before me upon both sides. I have examined it with care, and my conclusions are as follows:

I. Aside from other objections the application for the removal of the case to the Federal court was made too late. It should have been made before the judgment of the probate court was entered and the appeal taken to the higher State court. Thereafter the right of removal was at an end. The delay was fatal. Such an application cannot be made to an appellate court.

Stevenson vs. Williams, 19 Wall., 572.

Vannevar vs. Bryant, 21 Id., 41.

Low vs. Williams, 94 U. S., 650.

There was no waiver of this objection by the proponents. The order for the issuing of a writ of certiorari to bring up the full record was made by the Federal court sua sponte. The proponents were in no wise actors touching its issue.

II. The proponents are all citizens of Michigan. There were six contestants in the probate court, four of them were citizens of Michigan and two of other States. All of them appealed to the State circuit court. The four who were citizens united in one appeal and the two not citizens in another. The latter only petitioned that
92 court for the removal of the case, and gave the requisite bond.

The only question presented in the appellate court was as to the mental capacity of the testator, and the validity of the will. That court directed the same issue to be made upon each appeal as if they were separate cases. Upon an application to the supreme court of the State for an order of consolidation, it was held that the two appeals constituted inherently & necessarily but one case & must necessarily be tried together, and that hence no order of consolidation was needed. This was obviously correct. The case as presented was a unit & indivisible. The question to be tried was a single one and affected alike all concerned. By whomsoever raised, the result must necessarily be final and dispose of the entire controversy.

Lingan vs. Henderson, 1 Bland Ch'y, 236.

If the removal was well made, the anomaly will follow that each court may try the validity of the will at the same time independently of the other in the absence of indispensible parties, and opposite re-

sults may be reached. In our court the will may be held valid and invalid in the other, and for this state of things there can be no remedy.

For the purposes of this case it may be conceded that the 12th section of the act of 1789, and the acts of 1866 and 1867, re-enacted in the Rev. Stat. of the U. S. (sec. 639, clauses one, two, and three), are not repealed by the act of 1875.

(A.) The case was not removable under the section first named, because it was always held under that provision that all the plaint-
93 iffs must be citizens of the State where the suit is brought and all the defendants citizens of other States.

Dillon on Removal, pp. 17–18.

(B.) Nor under the act of 1866, because it is not a suit brought "for the purpose of restraining or enjoining" the contestants, nor can there be a "a final determination of the controversy so far as concerns" them "without the presence of other defendants in the cause."

Shields vs. Barrow, 17 How. 130.

(C.) Nor under the act of 1867, commonly known as the "Prejudice & local influence act," because the removal was not applied for upon either of those grounds; and neither was alleged by the petitioners.

(D.) The act of 1875. This act contains two clauses proper to be considered. It declares (1) that "any suit" * * * in which there shall be a controversy between citizens of different States, &c., "either party may remove said suit into the circuit court of the United States." Further (2) "and when in any suit, &c.," "there shall be a controversy which is wholly between citizens of different States and which can be fully decided as between them—then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the circuit court of the United States," &c.

Viewing the first of these extracts in the light of the past adjudications and in the absence of any expression from the Supreme Court, I feel constrained (whatever might be my judgement under other circumstances) to hold that the term "party" is collective and means all the plaintiffs and all the defendants, and that all on each side must be citizens of different States from those on the other side. See Dillon on Removals, pp. 29–30. This latter construction of the phrase
94 part'y derives support from the s'cond paragraph quoted. In regard to that paragraph it is sufficient to say that this "controversy" is not "wholly between citizens of different States" and cannot be "fully determined as between" the parties before the court. There are other contestants whose presence is indispensable. They are not, and it is believed cannot be, present as parties in this litigation, in the Federal tribunal.

III. A Federal court has no jurisdiction in cases of proceedings to establish a will. In Gaines vs. Fuentes et al., 92 U. S., 10, the Supreme Court said, "There are, it is true, in several of the decisions of this court expressions of opinion that Federal courts have no probate jurisdiction, referring particularly to the establishment of wills, and such is undoubtedly the case under the existing legislation of Congress."

By this ruling I am bound and it is conclusive of the case in hand.

See, also, the Broderick will case, 21 Wallace, 504; Duvivier vs. Hopkins, 116 Mass., 125; Yonley vs. Lavender, 21 Wall., 276; Tarver vs. Tarver, 9 Pet., 174; Gaines vs. N. O., 18 How., 470; Adams vs. Preston, 22 How. 473, 478.

Whether the proceeding here in question is a suit within the mean-

ing of the several removal acts, is a question not necessary to be considered.

Aug. 1st, 1878.

(S'g'd) N. H. SWAYNE,
Asso. Jus., &c.

☞The clerk will please file the above and call to it the attention of Messrs. Jennison and H. M. Duffield.

N. H. S.

(Endorsed:) Filed Aug. 15, 1878. A. Mandell. cl'k.

95 *Order remanding case to Wayne circuit court.*

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED.

On appeal of Alexander Fraser & Francis P. Fraser from the order of the probate court for the county of Wayne, Michigan, allowing & admitting to probate a paper purporting to be the last will & testament of said deceased, on removal from the circuit court for the county of Wayne.

This cause having been heretofore argued by counsel on the motion to remand the record and proceedings therein to the circuit court for the county of Wayne, and the same having been duly considered by the court, on motion of William Jennison, attorney and of counsel for said estate, it is ordered and adjudged that the said motion be granted, and that the record and proceedings therein be remanded to the circuit court for the county of Wayne, Michigan, from which it was removed.

NOVEMBER 5, 1878.

96, 97 *Copy bond on error.*

Know all men by these presents that we, Henry M. Duffield, Levi T. Griffin, and George B. Remick, all of Detroit, Michigan, are held and firmly bound together unto William Jennison, William A. Moore, William Adair, and John Pettie, all of Detroit, Michigan, in the full and just sum of three hundred dollars, to be paid to said William A. Moore, William Jennison, William Adair, and John Pettie, their certain attorney, executors, and administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this sixteenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, lately, at a session of the circuit court of the United States for the eastern district of Michigan, in a suit pending in said court between William A. Jennison, William A. Moore, William C. Adair, and John Pettie as plaintiffs, and Alexander Fraser and Francis P. Fraser, defendants, a judgment was rendered against the said defendants and in favor of the said plaintiffs, remanding the aforesaid suit back to the circuit court for the county of Wayne; and the said Alexander Fraser and Francis P. Fraser, defendants, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William A. Jennison, William A. Moore, William C. Adair, and John Pettie, citing and admonishing them to be and appear at a Supreme Court

98 of the United States to be holden at Washington on the second Monday of October, eighteen hundred and seventy-nine.

Now the condition of the above is that if the said Alexander Fraser and Francis P. Fraser shall prosecute said writ of error to effect and answer all costs if they fail to make their plea good, then the above obligation is void; else to remain in full force and virtue.

July 16, 1879.

(Sig'd) HENRY M. DUFFIELD. [L. S.]
(") LEVI T. GRIFFIN. [L. S.]
(") GEO. B. REMICK. [L. S.]

Sealed and delivered in the presence of—
THOMAS J. COMLY.
JNO. A. WEIR.

Approved as to the amount and the sufficiency of the sureties.
(Sig'd) H. B. BROWN,
District Judge.

99 EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify the above and foregoing to be a true transcript of the record in said court in the matter of the estate of Alexander D. Fraser, deceased, on appeal of Alexander Fraser and Francis P. Fraser from the order of the court of probate of Wayne County, Michigan, allowing & *per*mitting to probate the last will & testament of said deceased; that I have carefully compared the same with the original thereof, and the same is a true and correct transcript of the whole thereof, and also of the bond in error in said cause.

In testimony whereof I have hereunto subscribed my name officially and affixed the seal of said court this 30' day of September, A. D. 1879, at Detroit.

[SEAL.] ADDISON MANDELL, *Clerk.*

Clerk's costs on return, $22.20.

(Indorsement on cover:) No. 342. Alexander Fraser and Francis P. Fraser, plaintiffs in error, vs. William Jennison, William A. Moore, William Adair, and John Pettie. E. Michigan, C. C. U. S. Filed 15th October, 1879.

REC. 342—3

16-191

OFFICE SUPREME COURT U.S.
FILED
OCT 17 1882
JAMES H. MCKENNEY, CLERK

Supreme Court of the United States

OCTOBER TERM, 1882.

ALEXANDER FRASER AND FRANCIS P. FRASER,
Plaintiffs in Error.
v.
WILLIAM JENNISON, WILLIAM A. MOORE, WILLIAM ADAIR AND JOHN PETTEE.
Defendants in Error.

No. 72.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

Brief for Plaintiffs in Error.

HENRY M. DUFFIELD,
Attorney for Plaintiffs in Error.
EDWARDS PIERREPONT,
Of Counsel.

W. JENNISON,
W. A. MOORE,
Attorneys for Defendants in Error.

DETROIT:
THORNDIKE NOURSE, STATIONER AND PRINTER.
1882.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ALEXANDER FRASER AND
FRANCIS P. FRASER,
Plaintiffs in Error.
v.
WILLIAM JENNISON,
WILLIAM A. MOORE,
WILLIAM ADAIR AND
JOHN PETTEE.
Defendants in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

OCTOBER TERM, 1882.

STATEMENT OF THE CASE.

Alexander D. Fraser, the ancestor of plaintiffs in error, who was a widower and childless, died at Detroit in 1877, leaving him surviving the plaintiffs in error and other nephews and nieces who were his nearest of kin.

The defendants in error filed in the Probate Court for Wayne County, Mich., a paper writing purporting

to be the last will and testament of said Alexander D. Fraser; the Probate Court admitted the same to probate and the plaintiffs in error took an appeal therefrom to the Circuit Court for the county of Wayne.

Record, pp. 5, 6, and 7.

Certain other heirs of the decedent also filed their separate appeal from said allowance. The plaintiffs in error are citizens of Illinois and Iowa respectively. In the Circuit Court for the county of Wayne an issue was made on the appeal of the plaintiffs in error, under the statute of Michigan.

See *post* p. 7.

All the other heirs of the decedent were citizens of the State of Michigan, as were also the executors of, and beneficiaries under, said alleged will, except two nieces who were aliens and subjects of the kingdom of Great Britain.

The plaintiffs in error, after issue had been formed in the Circuit Court for Wayne county, petitioned for a removal of their appeal to the Circuit Court of the United States for the Eastern District of Michigan. The State Court denied the petition, but plaintiffs in error perfected the removal of their appeal and filed the record in the Federal Court.

Subsequently, on motion of defendants in error, Mr. Justice Swayne issued a writ of *certiorari* to bring the appeal of the resident contestants into the Federal Court, and on the return of said writ remanded the appeal of the plaintiffs in error to the State Court.

The case under this writ of error involves:

First. The question whether the appeal of plaintiffs in error was removable to the Circuit Court of the United States for the Eastern District of Michigan.

Second. If so, whether the fact of the taking of another and separate appeal by contestants who were residents of Michigan, deprived the plaintiffs in error of the right of removal.

ERRORS ASSIGNED.

First. In that the Circuit Court of the United States for the Eastern District of Michigan held that this cause was not rightfully removed into that court, and should be remanded to the Circuit Court for the County of Wayne in the State of Michigan.

Second. In that the said Circuit Court of the United States held that the application for the removal of the cause to the Federal Court was made too late, and should have been made before the judgment of the Probate Court for the County of Wayne was entered, and the appeal taken to the higher State Court.

BRIEF.

Preliminary to the argument, we call the attention of the Court to the following statutory provisions of the State of Michigan relative to the proving of wills.

Under the law of Michigan, it is the duty of any person having the custody of a will to deliver the same to the Probate Court having jurisdiction, within thirty days after knowledge of the death of the testator,

Com. Laws of Mich., 1871, p. 1373, § 4334,

as follows:

"Every person other than the judge of probate having the custody of any will, shall, within thirty days after he has knowledge of the death of the

testator, deliver the same into the Probate Court which has jurisdiction of the case, or to the person named in the will as executor."

A penalty is attached to a neglect of this duty,

Com. Laws of Mich., 1871, p. 1374, § 4336,

as follows:

"Every person who shall neglect to perform any of the duties required in the last two preceding sections, without reasonable cause, shall be liable to each and every person interested in such will, in the sum of ten dollars damages for each and every month he shall so neglect, after the thirty days above mentioned, to be recovered in an action on the case, with costs."

The statute then provides that *the Court shall appoint* a time and place for proving the will, where all concerned may appear and contest the probate thereof, and shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of court in such newspaper * * as the Court shall direct, * *

Com. Laws of Mich, 1871, p. 1374, § 4338,

as follows:

"When any will shall have been delivered into or deposited in any Probate Court having jurisdiction of the same, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this State as the judge shall direct, three weeks successively, previous

to the time appointed; and no will shall be proved until notice shall be given as herein provided."

If no one appears to contest the probate of the will, the court may grant probate thereof on the testimony of one witness only,

Com. Laws of Mich., 1871, p. 1374, § 4339,

as follows:

"If no person shall appear to contest the probate of a will at the time appointed for that purpose, the Court may, in its discretion, grant probate thereof, on the testimony of one of the subscribing witnesses only, if such witness shall testify that such will was executed in all the particulars as required in this chapter, and that the testator was of sound mind at the time of the execution thereof."

The probate of a will of real or personal estate is conclusive as to its due execution,

Com. Laws of Mich., 1871, p. 1374, § 4341,

as follows:

"No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the Probate Court as provided in this chapter, or on appeal in the Circuit Court or Supreme Court; and the probate of a will of real or personal estate, as above mentioned, shall be conclusive as to its due execution."

From any order or decree of a Probate Judge, any person aggrieved thereby may appeal to the Circuit Court for the same county, by filing a notice thereof with the judge of probate, with his reasons therefor, and an appeal bond, within sixty days from the date of the act appealed from,

Com. Laws, Mich., 1871, p. 1562, § 5216,

as follows:

"In all cases not otherwise provided for, any person aggrieved by any order, sentence, decree, or denial of a judge of probate, may appeal therefrom to the Circuit Court for the same county, by filing a notice thereof with the judge of probate within sixty days from the date of the act appealed from, with his reasons for such appeal, together with such bond as is required in the next section."

The appellant must give notice of such appeal *to the adverse party*, and procure and file in the Circuit Court to which the appeal is taken, "a certified copy of the record or proceedings appealed from, of the notice of said appeal, and reasons therefor, with evidence of the filing of the requisite bond, and that notice has been given to the *adverse party*,"

Com. Laws, Mich., 1871, p. 1562, §§ 5217, 5218, 5219.

as follows:

§ 5217. "The party appealing shall, at the time of filing notice thereof, file with the judge of probate a bond to the adverse party, in such penalty, with such surety or sureties as the judge of probate shall approve, conditioned for the diligent prosecution of such appeal, and the payment of all such damages and costs as shall be awarded against him in case he shall fail to obtain a reversal of the decision so appealed from."

§ 5218. "The appellant shall give notice of such appeal to the adverse party, with his reasons therefor, in such manner as the Probate Court shall direct, at least fourteen days before the same shall be entered in the Circuit Court."

§ 5219. "The person appealing shall procure and file in the Circuit Court to which the appeal is taken, a certified copy of the record or proceedings appealed

from, of the notice of such appeal filed in the Probate Court, and the reasons for such appeal, together with evidence of filing of the requisite bond, and that notice has been given to the adverse party, according to the order of the Probate Court."

§ 5220. "When such certified copy shall have been filed in the Circuit Court, with the evidence of filing of the requisite bond and of giving notice as aforesaid, such court shall proceed to the trial and determination of the question *according to the rules of law*, and if there shall be any question of fact to be decided, issue may be joined thereon under the direction of the Court, and a trial thereof had by jury."

Com. Laws, Mich., 1871, p. 1562–3, § 5220.

And this right to a trial by jury cannot be taken away.

Grovier v. Hall, 23 Mich., R. p. 7.

The Circuit Court may * * * * "make such order or decree thereon as the judge of probate ought to have made, and may remit the case to the Probate Court for further proceedings."

Com. Laws, Mich., 1871, p. 1563, § 5226.

Costs may be awarded against the unsuccessful party,

Com. Laws, Mich., 1871, p. 1563, § 5228,

as follows:

"In all cases that shall be contested, either in the Probate Court or in the Circuit Court, such Court may award costs to either party, in its discretion, to be paid by the other, or to be paid out of the estate which is the subject of the controversy, as justice and equity shall require."

In the case at bar formal issue had been joined in the State Circuit Court, between the proponents and the contestants, by declaration and plea

Record, pp. 7, 8, 9,

and a trial by jury demanded by the contestants. At this stage plaintiffs in error filed their petition to remove, and the cause was duly entered in the Federal Court on the first day of the next succeeding term.

Plaintiffs in error insist that, under the probate law of Michigan, the proceedings for the allowance of a will in the Probate Court is not such a suit in the State Court as the removal acts contemplate.

That proceedings in that court are initiatory only.

And that they are not between parties, no petition for probate is necessary, no proponents need ask to set the Court in motion.

Stebbins v. Lathrop, 4 Pick. R. p. 33.

When a will is delivered to it, it is the Court's duty to act *suo motu*.

Com. Laws, Mich., 1871, vol. 2, p. 1374, § 4338, cited supra ~~post~~, p. 4.

The proceeding may go to a hearing and determination in the Probate Court without the presence before the Court of any parties, either proponents or contestants.

It is not contended by plaintiffs in error that these proceedings are removable into the Federal Courts; on the contrary, it is insisted that they are not.

In *Gaines v. Fuentes*, 92 U. S. R. p. 21, we are thus instructed by the opinion of this Honorable Court:

"There are, it is true, in several decisions of this Court, expressions of opinion that the Federal Courts have no probate jurisdiction, referring particularly to

the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will, which is one *in rem*, and does not necessarily involve any controversy between parties; indeed, in the majority of instances, no such controversy exists.

"In its initiation all persons are cited to appear, whether of the State where the will is offered, or of other States.

"From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different States, of which the Federal Courts have concurrent jurisdiction with the State Courts under the Judiciary Act."

And it is for these reasons that a proceeding to probate a will while pending in the Probate Court cannot be removed into the Federal Court.

Hargroves v. Redd, 43 Georgia R. p. 142.

But a removal may be had from the Circuit Court in an appeal in these cases as well as in the cases of proceedings under the power of eminent domain or in actions of unlawful detainer of real estate.

In

Patterson v. Boom Co., 3 Dillon R., p. 465
Affirmed 98 U. S. R., p. 403,

a proceeding to appropriate private property for pub lic use which was initiated before commissioners, but at the time the removal was applied for had assumed the form of an action at law, on appeal from their decision was held properly removable into the Federal Court.

And in

Rathbone Oil Co. v. Ranch, 5 West Vir. R., p. 79.

an action of unlawful detainer of real estate commenced before a magistrate and pending on appeal in the Circuit was held properly removable.

Our contention is that upon the appeal to the Circuit Court, which the statute gives to any person aggrieved by the order allowing or rejecting a will, when the issue is formed under the statute before cited, the cause at once becomes one *inter partes*—the proponents and all parties not appealing on the one side—and the appealing contestants on the other.

There are no other parties. The issue is formed upon the declaration of the proponents and the pleas of the appealing contestants. Either party has the right to demand and have a jury to try the issue of fact.

In the Probate Court there can be no formal issue upon pleadings. There can be no jury trial, nor any review of errors of law or fact save by appeal.

Such appeal does not remove the estate from the jurisdiction of the Probate Court; on the contrary, the Court retains the same and appoints special administrators to take charge thereof,

Com. Laws, Mich., 1871, vol. 2, p. 1386, § 4381,

as follows:

§ 4381. "When there shall be a delay in granting letters testamentary or of administration, occasioned by an appeal from the allowance or disallowance of a will, or from any other cause, the judge of Probate may appoint an administrator to act in collecting and taking charge of the estate of the deceased, until the question on the allowance of the will, or such other question as shall occasion the delay, shall be terminated and an executor or administrator be thereupon appointed; and no appeal shall be allowed from the appointment of such special administrator."

In this very case at bar the defendants in error, as special administrators, have collected and taken charge of the entire estate and paid all the debts thereof.

All that remains to be settled is, whether the alleged will is or is not the will of the deceased.

Now, as before shown by the statute, the right to question the validity or the due execution of such alleged will is given to any person interested in the controversy.

We maintain that if the Circuit Court of the State has jurisdiction to try the question of will or no will, then in a case in which the requisite citizenship exists the Circuit Court of the United States for the proper district has the same right. Why should it not?

It is expressly held by the Supreme Court of Michigan that in an appeal from the Probate Court of a will there is one main issue, and only one, that is, whether the paper propounded is or is not a will.

In re Hathaway's Appeal, 46 Mich. R., p. 328.

Where one interested does not take or join in an appeal from the Probate Court, he has no right to contest the will on the trial of the appeal in the Circuit. His true position being that of an appellee.

Allison v. Smith, 16 Mich., R. p. 405.

The only judgment which the Circuit Court can render is a judicial declaration that the paper proposed is or is not a will, and all that the Circuit Court does is to certify that judgment to the Probate Court.

Jackson v. Hosmer, 14 Mich., R. p. 87.
Taff v. Hosmer, 14 Mich., R. p. 248.

It is manifest, therefore, that all that the statute

requires the State Court to do, may be done in the Federal Court as well.

There is no force in the objection that this is a suit arising in the settlement of an estate of a deceased person.

The Supreme Court of the United States has repeatedly affirmed the jurisdiction of the Federal Courts over cases involved in the distribution of decedent's estates, when that jurisdiction was invoked by the non-resident citizen.

In

Suydam v. Broadnax, 14 Peters, R. p. 67.

plaintiffs brought an action in the Circuit Court of the United States against the administrators of a deceased person, notwithstanding the statute of Alabama, giving the Orphans' Court of Alabama jurisdiction over the decedent's estate, expressly provided that no suit or action should be commenced or sustained against any executor or administrator, etc.

The Supreme Court of the United States sustained their action. Mr. Justice Wayne says:

"The 11th section of the Judiciary Act was intended to give suitors having a right to sue in the Circuit Court remedies co-extensive with these rights. These remedies would not be so if any proceedings under an act of the Legislature exempting a person of such State from suit could be pleaded to abate a suit in the Circuit Court."

A similar case was

Union Bank of Tennessee v. Jolly's Administrators, 18 Howard, R. p. 503.

There is no difference in principle on the point we are considering between the administration laws and

the insolvent laws of a State. And the authorities do not recognize any.

In

Payne v. Hook, 7 Wall., R. p. 425.

The United States Supreme Court upheld the Federal jurisdiction of a bill in equity filed by one distributee of anintestate's estate against an administrator, notwithstanding the statute of Missouri gave to the local County Court, which is the Court of Probate, exclusive jurisdiction over all disputes concerning the duties or accounts of administrators until final settlement, and although the administration complained of was still in progress in the Probate Court, to which resort might have been had.

The Court say, in answer to the above objection, "We have repeatedly held that the jurisdiction of the Courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate their judicial power," citing

Hyde v. Stone, 20 Howard, R. p. 175.
Suydam v. Broadnax, and
Union Bank v. Jolly's Administrators,
ubi. supra.

It has been expressly held where a statute of a State places the whole estate, real and personal, of a decedent within the custody of the Probate Court of the county, so that the assets may be fairly and equally distributed among creditors without distinction as to whether resident or non-resident, *a non-resident creditor may get a judgment* in the Federal Court against the resident executor or administrator, and come in on the estate according to the law of the State, for such

payment as that law marshalling the rights of creditors awards to creditors of his class.

Yonley v. Lavender, 21 Wall., R. p. 276.

Between this last case and the case at bar so far as the point we are considering is concerned there can be no distinction.

Each case involves a question arising in the distribution of an estate of a deceased person.

If the Federal Court has jurisdiction, despite the administration laws of the State, over actions against executors or administrators and may render judgment against them, they certainly should have the same jurisdiction in actions against executors to test the validity of an alleged will.

The adjudication of the Federal Court that one is a creditor affects the administration of the estate in the Probate Court equally in kind, if not in amount, with the adjudication in favor of an heir against the validity of a will.

It is believed that there can be no serious question as to the right of the Federal Court to enforce its judgment in either case even though it should be necessary to mandamus the State Court.

U. S. Rev. Stat. § 716, which is the 14th section of the Judiciary Act.

Supervisors v. United States, 4 Wallace, R. p. 435.

Riggs v. Johnson County, 6 Wallace, R. p. 166.

To summarize the argument, as the case at bar stood in the Circuit Court of the State at the time of filing the petition to remove, there was a controversy.

That controversy was in a suit. That suit was *inter partes*. Those parties were citizens of different States.

The requisite jurisdictional amount was involved. The cause was pending in a court proceeding "according to the rules of law."

Its practice is the same as the practice of the Federal Court. There is nothing in the mode of trial which differs from that in the Federal Court. In either court the cause proceeds in the same manner. The Federal Court can render the same judgment as the State Court, and can certify it to the Probate Court equally as well as the State Court. It is simply a judgment affirming or disallowing the will, and granting costs against the defeated parties which either court can enforce by execution.

And the case at bar falls fairly within the decision in

Gaines v. Fuentes, 92 U. S. R. pp. 9, 10.

which held that under the removal acts the Federal Courts are invested with jurisdiction when the removal is made, to pass upon and determine a controversy between a citizen of the State where the suit is brought and a citizen of another State, in any suit brought in the State Court, though the Federal Court could not have taken original cognizance of the case.

Opinion of the Court per Mr. Justice Field, p. 20.

The following language on page 22 is peculiarly apt for the purpose of this case, and seems to be decisive of it, viz.: "But whenever a controversy in a suit between such parties (*i. e.* citizens of different States) arises respecting the validity or construction of a will or the enforcement of a decree admitting it to probate, there is no more reason why the Federal Court should not take jurisdiction of the case than there is that they

should not take jurisdiction of any other controversy between the parties."

The case of the contestants is just such a case.

The statutory appeal so called is in reality only an opportunity given to them to contest the validity of the will.

It is quite analogous to the common law action of *devisavit vel non.* The decedent's estate is no longer involved in the controversy, except indirectly and remotely, and, as already shown, no more so than in the case of a creditor obtaining judgment against the representatives of a deceased person. The proceeding is changed from one *in rem* to one purely *inter partes.*

There are but few direct adjudications on this question; the only ones we have been able to find closely analogous are,

In favor of the jurisdiction,

Gaines v. Chew, 2 Howard, R. p. 619.
Gaines v. Fuentes, ubi. supra.
Price v. Foreman, 12 Federal Reporter 801.

Against the jurisdiction,

Tibbatts v. Berry, 10 B. Monroe, R. p. 473.
Hargroves v. Redd, 43 Georgia, R. p. 142.

In Gaines v. Chew, it is strongly intimated that the Federal Court might under certain circumstances set up a will and prove it.

Gaines v. Fuentes has before been quoted.

In Price v. Foreman the case was remanded to the State Court by Mr. Justice Harlan upon the sole ground of want of requisite citizenship.

The Federal jurisdiction so far as it depended on the nature of the controversy was not questioned.

In

Parsons v. Morrissey, Circuit Court U. S. for Eastern Dist. of Mich.

the late circuit and district judges decided the precise point here involved in favor of the jurisdiction and issued a *certiorari* to compel the State Court to send up the record. And the U. S. Court afterwards tried the case on the merits.

We do not think Tibbatts v. Berry is in point.

It was a writ of error to a county court. The decision was under the act of 1783 and there were several defendants who were citizens of the same State with plaintiffs. The question of removal is disposed of in a single sentence.

Hargroves v. Redd was an attempt to remove a cause from the Court of Ordinary, under the local prejudice act of 1867.

The cause had once been tried below and the judgment reversed by the Supreme Court. Before the second trial all but one of the caveators withdrew and she moved to transfer the case. It differs materially from the case at bar.

II.

The learned Justice erred in sustaining the objection to the removal that there are other contestants who have appealed and who are citizens of the same State with the proponents.

Under the decisions in

Jackson v. Hosmer, *ubi. sup.*
Taff v. Hosmer, *ubi. sup.*

the Supreme Court of the State decided that a *non-appealing contestant* had no right to contest the will on the appeal in the Circuit Court and was in reality an appellee.

The statute of Michigan gives a separate right of appeal to any person aggrieved. The plaintiffs in error took their separate appeal and formed their issue under the statute. They demanded a separate jury trial.

Record, pp. 7, 8, and 9.

On the 22nd day of April, 1878, they filed their petition for the removal of the cause to the Federal Court. On the first day of June, 1878, they filed a record in that court.

June 8th, 1878, defendants in error moved to remand the cause.

Record, pp. 15, 16, and 17.

On June 10th, 1878, in an attempt to oust the jurisdiction of the Circuit Court of the United States defendants in error obtained an *ex parte* order of the State Court consolidating the two appeals. This order was obtained without notice to any one.

Record, p. 29.

That the purpose of this order was to prevent the removal of the cause to the Federal Court, and that the State Court joined with the defendants in error to accomplish this purpose, is evident from the fact that the order is made on the *ex parte* motion of the proponents, and the two sets of appellants are ordered to join the issue in their appeals without even an opportunity to be heard against the same.

We insist that the defendants in error can take no advantage under this order. It was made after the cause had been regularly removed into the Federal Court. If the Federal Court had jurisdiction, the cause was out of the Circuit Court for the County of Wayne and in the Circuit Court of the United States. The action of the State Court was like that of the Court of Common Pleas in the case of

Insurance Co. v. Dunn, 19 Wallace, R. p. 214.

which is described in the opinion of this Honorable Court as a clear case of usurped jurisdiction and a gross illegality.

The case therefore stands unaffected by the pretended order of the State Court consolidating the two appeals.

The State law gave to plaintiffs in error the right of a separate appeal.

Ante p. 6.

They availed themselves of this right and removed the appeal to the Federal Court. It needs no argument to show that if this right of removal existed in case they were sole appellants, it could not be defeated by another appeal taken by citizens of the State of Michigan whether collusively or in good faith.

This being conceded, it seems too plain to need further discussion, that the appeal of plaintiffs in error is a separate controversy between citizens of the State in which the suit is brought, and the citizens of another State.

Following the rule laid down in the

Removal Cases, 100 U. S. R.p. 457.

and arranging the parties upon the respective sides of the real matter in dispute, the plaintiffs in error are all those on one side. They are citizens of different States from the executors and beneficiaries, who are those on the other side, and their case is removable under the first clause of the second section of the act of March 3d, 1875.

For we have before shown by

Jackson v. Hosmer, *ubi. sup.*
Taff v. Hosmer, *ubi. sup.*,

the true position of all the persons interested in the probate of a will who do not join in the appeal.

Again, we submit that the case of the plaintiffs in error is removable under the second section of the act of March 3d, 1875.

It is plain that the success of the plaintiffs in error in their appeal can work no prejudice to the other appealing contestants. Both appeals are in pursuit of a common purpose, *i. e.*, to break the will.

The case differs wholly from one in which the decision of the Federal Court would create a liability over against the other parties like a judgment upon a joint note or other joint obligation.

The executors of, and beneficiaries under, the will are citizens of the State of Michigan. So far as concerns the plaintiffs in error, the controversy of will or no will can be determined as to them in their separate appeal, without the presence of the other contestants. If the latter have any place at all they are appellees *quoad* the appeal of the plaintiffs in error.

The construction which the learned judge, in deciding the case below, put upon the statute of March 3d, 1875, has been overruled and denied in

Barney v. Latham, 103 U. S. R., p. 212.

Under the instruction of this decision, we understand that the act of 1866 authorized the removal of the separable controversy between the plaintiff and the defendant or defendants seeking such removal, leaving the remainder of the suit at the election of the plaintiff in the State court, while the act of 1875 provides, in the same class of cases, for the removal of the entire suit. It is therein also held that although the defendant, who is a citizen of the same State with one of the plaintiffs, is a *proper party to the suit*, it will not affect the right of removal, unless he is *an indispensable party to such separable controversy.*

The case of

Blake v. McKim, 103 U. S. R., p. 339.

was an appeal by a citizen of Massachusetts against the executors of Blake, two of whom were citizens of Massachusetts, and one a citizen of New York, to enforce a liability of a testator. It is clear that all the executors were indispensable parties.

The case at bar differs in that all the executors and all the beneficiaries under the will are citizens of different States from either of the plaintiffs in error.

The case of

Price v. Foreman, *ubi. sup.*,

was a bill in equity by an heir to obtain a decree disallowing a will. There can be no doubt of the correctness of the ruling by Mr. Justice Harlan in that case, that the Federal Court had no jurisdiction, because the complainant and the executors under the will were citizens of the same State. Stress is laid by the learned Justice, on the relations of the executors to a certain portion of the estate which rendered them something

more than mere naked trustees, and they were held to be indispensable parties.

In the case at bar, what reason can be given for deciding that the other contestants are indispensable parties? None is given by the learned Justice who rendered the decision in the Court below.

By indispensable parties are meant, either persons without whose presence the issue to be determined can not legally be tried, or persons whose interests would be finally adjudicated by the judgment of the Federal Court. The plaintiffs in error and the proponents of the will, can determine their controversy in the Federal Court without the presence of the other contestants, as well as they could have done had the other contestants never appealed,

And the contestants of the will who were residents of Michigan may profit and cannot suffer, whatever may be the result of the controversy in the Federal Court.

It is true, if jurisdiction is taken under the act of 1866, the proponents may be compelled to litigate the validity of the will in two suits, but this is also true in a large class of cases in which the Federal Courts have taken jurisdiction under the act of 1866. It follows as a necessary corollary to the decision that there is a separable controversy.

Counsel argue that the foreign citizens may get a verdict against a will in the United States Court, while the proponents may get a verdict in the State court, and that this would be an anomaly.

Does not this very objection presuppose that there can be a final determination of the controversy so far as it concerns a non-resident citizen without the presence of a resident citizen? But it would in fact be no more of an anomaly than in the case of a child born

after the making of the will where the statute itself provides that the estate should be part testate and intestate.

Com. Law, Mich., p. 1375, § 4346.

Neither would it be any more of an anomaly than in that class of cases upheld by an unbroken line of decisions in this Court wherein non-resident creditors are authorized to maintain actions in the Federal Courts against executors or administrators notwithstanding the prohibition against suits by creditors against the personal representatives of deceased persons.

However this may be, the consequences to the proponents do not take away the jurisdiction. The statute is not in aid of the resident party but designed to shield the non-resident citizen with the protection of the Federal Court. *If he* can litigate his rights in that court with the resident party or parties opposing him, or whose interests would be adversely affected by his success, he may remove.

In

Girardin v. Moore, 3 Woods, C. C. R., p. 402,

Mr. Justice Bradley holds, The right of removal exists in all cases where there are substantial parties citizens of different States on opposite sides of the cause *although there* are parties on opposite sides who are citizens of the same State.

If there are other parties to the suit, of common citizenship with the persons who are denying the claim of the non-resident, who will profit by his success and cannot suffer by his failure, by what authority can the Federal Court deny jurisdiction?

Such a decision would be at variance with the very object of the constitutional grant of jurisdiction.

The Federalist in discussing this article of the Constitution, first treats of the absolute necessity of a national tribunal for the decision of controversies in which foreigners are concerned, and then proceeds:

"In order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens."

A construction of the statute which would forever preclude the possibility of a resort to a Federal tribunal in controversies between citizens of different States, simply because in the same case there is also a controversy between citizens of the same State, would be in derogation of the terms of this provision of the constitution, at variance with the letter of the acts of 1866 and 1875 and subversive of the purposes which they are intended to secure. As we read the learned opinion of Mr. Justice Bradley in the

Removal Cases, 100 U. S. R., p. 479.

we understand it to support the doctrine contended for by us, if indeed he does not go further.

HENRY M. DUFFIELD,
Attorney for Plffs. in Error.

EDWARDS PIERREPONT,
Of Counsel.

SUPPLEMENT.

We submit, as a supplement to this brief, a grouping of the different classes of cases, over which the Federal Courts have assumed jurisdiction under the removal acts.

Suits by attachment,

Barney v. Globe Bank, 5 Blatchf. R., p. 107
Sayles v. N. W. Ins. Co., 2 Curtis C. C. R., p. 212.
People's Bank v. Calhoun, 102 U. S. R., p. 256.

Ejectment cases,

Ex parte Turner, 3 Wall. Jr. R., p. 258.
Torrey v. Beardsley, 4 Wash. C. C. R., p. 241.
Allen v. Robinson, 1 Dillon R., p. 119.
Ex parte Girard, 3 Wall Jr. (Grier, J.), 263.
Crane v. Reeder, 15 Albany Law J. (Emmons, C. J.), p. 103; followed in same case by Baxter, C. J.

Replevin cases,

Kern v. Huidekoper, 103 U. S., 485.
Beecher v. Gillett, 1 Dillon R., p. 308,
Dennistoun v. Draper, 5 Blatchf. R., p. 336.

An action against a superintendent of Insurance:

Rolfe v. Runtle, 103 U. S. R., p. 222.

A bill in equity to reform an insurance policy:

Charter Oak Co. v. Star Ins. Co., 6 Blatchf. R. p. 208.

A bill in equity for an accounting,

Barney v. Latham, 103 U. S. R., p. 205.

A special statutory proceeding in the nature of a chancery remedy to confirm a tax title:

Parker v. Overman, 18 How. R., p. 137.

A bill to restrain collection of a tax,

Harter v. Kernochon, 103 U. S. R., p. 562.

A proceeding to appropriate private property for public use, begun before commissioner, but which at the time the removal was applied for, had assumed the shape of an action at law regularly docketed in the State Court, to be tried and determined as in other cases.

Patterson v. Room Co., 3 Dillon R., p. 465.
Affirmed 98 U. S. R., p. 403.

A suit in a State court to restrain or stay the execution of a judgment of the State court by a seizure and sale of complainant's lands' even after an injunction had been allowed in the State court.

Watson v. Bondurant, 2 Wood's C. C. R., p. 166, s. c., 3 Cent. L. J. 398.
Affirmed in Bondurant v. Watson, 103 U. S. R., p. 281.

A petition for a mandamus,

Railroad Co. v. Mississippi, 103 U. S. R., p. 135.

A bill to restrain a sheriff from selling personal property levied on under an execution from State court,

Allen v. Ryerson, 2 Dillon C. C. R., p. 501

An action of unlawful detainer of real estate commenced before a magistrate, and pending on appeal in the Circuit Court,

Rathbone Oil Co. v. Ranch, 5 West Va. R., p. 79.

TATES

Court.

M, 1882.

2.

rror to the Circuit Court of the United States for the Eastern District of Michigan.

fs in Error.

's in Error.

C,

nsel.

N,

E,

Defendants in Error.

16-191

OFFICE SUPREME COURT U. S.
FILED
OCT 27 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1882.

WILLIAM JENNISON,
WILLIAM A. MOORE,
WILLIAM ADAIR AND
JOHN PETTIE,
Defendants in Error,
ADS.
ALEXANDER FRASER AND
FRANCIS P. FRASER,
Plaintiffs in Error.

No. 72.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

BRIEF OF WM. JENNISON,

For Defendants in Error.

WM. JENNISON,
WM. A. MOORE,
Attorneys and of Counsel for Defendants in Error.

HENRY M. DUFFIELD,
Attorney for Plaintiffs in Error.
EDWARDS PIERREPONT,
Of Counsel.

DETROIT:
DETROIT PRINTING CO., 75 BATES ST.
1882.

Supreme Court of the United States.

IN THE MATTER OF THE ESTATE OF ALEXANDER D. FRASER, DECEASED. WM. JENNISON, ET. AL., *Defendants in Error.* ads. ALEXANDER FRASER AND FRANCIS P. FRASER, *Plaintiffs in Error.*	Removal of Record from the Circuit Court, for the County of Wayne, Michigan, to the United States Circuit Court, E. D. Michigan.

Brief of Wm. Jennison on behalf of Proponents of Will, Defendants in Error, on Motion to Remand Record to State Court.

This was a motion in the United States Circuit Court for the E. D. of Michigan to remand the Record in this cause to the State Court. After full hearing before Mr. Justice *Swayne*, the motion was granted and an order remanding the record entered.

[*See opinion, Record, p. 30.*]

A writ of error was sued out by defendants, on the motion to remand, to review the validity of said order.

The grounds of the motion were as follows:

"*First.* That the controversy sought to be removed is the probate of a will, and is not such an action as the United States Circuit Court can acquire jurisdiction of under any of the Acts of Congress of the United States pertaining to the removal of causes from State Courts.

Second. That if said Court can exercise jurisdiction in such cases, the petition and bond required by the act of Congress on removal should have been presented and filed in the State Court of original jurisdiction, to wit, the Probate Court for the county of Wayne, before or at the term of said Court at which said cause could first have been tried. And that said appellants, having submitted themselves by written objection to the jurisdiction of said Court and gone to trial upon the merits, it is too late to first apply for a removal to the Circuit Court of the United States after an appeal taken from the order of said Probate Court to the State Appellate Court.

Third. Said Court has no jurisdiction of said cause, because by the record in said Probate Court, as well as the Circuit Court for the county of Wayne, it appears that the said proponents at the time of entering their appearance in said Probate Court, as well as the filing of said petition, were, and now are, citizens of the State of Michigan; that four of the contestants of said will in the Probate Court, to wit, Ellis P. Fraser, Mary Colvin, Elizabeth Colvin, and Sophia Reddin, were at said mentioned times, and now are, also citizens of Michigan; and that the appellants who seek to remove this cause from the State Court were, and now are, citizens of Illinois and Iowa respectively.

Fourth. Because while all the said contestants appealed from the said order of the said Probate Court, yet only two of them seek to remove said cause to this Court, and which is in effect the removal of but part of the cause, and which the Acts of Congress do not permit except in specified cases.

Fifth. The petition is not entitled in any cause pending in the State Court.

Sixth. The said petition is not signed by any of the petitioners.

Seventh. The record of said cause shows no jurisdiction in this Court.

Eighth. This motion is based on the petition of removal, the record and files in said cause, and the affidavits of proponents."

At the opening of the argument on this motion in the Court below, it appearing that the record of the separate appeal from the decree of the Probate Court by four of the contestants remained in the State Court, a *certiorari* issued by order of the United States Court to bring it up, and a return was made thereto.

STATEMENT OF CASE.

The record as it now appears shows as follows:

1. That the proceeding was the probate of the will of the late A. D. Fraser, a citizen of Michigan, and that the executors, the proponents, were also citizens of Michigan.

2. That an order of publication of notice of hearing the proof of the will was duly made by the Probate Court.

3. That six nieces and nephews of said Fraser, and heirs-at-law, filed notice of appearance and intention to contest said probate in the Probate Court.

4. That they appeared by counsel at the hearing and did contest said probate.

5. That the Probate Court made a decree on the 9th day of November, 1877, admitting the said will to probate, and issued letters to the proponents mentioned.

6. That two of said contestants, Francis and Alexander Fraser, the present plaintiffs in error, were *citizens of Illinois* and *Iowa*, and joined in an appeal from said decree to the State Court.

7. That said four remaining contestants, *citizens of Michigan*, on the same day joined in a separate appeal from the same decree, and on the same ground, to the State Court, all represented by the same counsel.

8. That on filing the said two records of said appeals in the State Circuit Court, in pursuance of an order, the proponents filed their allegations in each appeal in support of the said will, and the contestants filed their separate objections thereto.

9. That the State Circuit Court made an order consolidating the records in said two appeals.

10. That a petition and bond were filed in the State Court by but *two* of the contestants, and on *their own behalf*, for the purpose of removal to United States Circuit Court, and which on hearing was refused.

11. That a motion to remand was made in United States Circuit Court by the proponents of the will and granted.

The record then in brief shows:

a. That the proceeding was the *probate of a will.*

b. That the same was contested by the present plaintiffs in error and four of the other contestants.

c. That a decree admitting the will to probate was made by the Probate Court for Wayne county.

d. That the present plaintiffs in error, and the remaining four contestants in error respectively appealed from the said decree to the State Court.

e. That the present plaintiffs in error are citizens of Illinois and Iowa. That the remaining four contestants are citizens of Michigan, and the proponents of the will are citizens of Michigan.

f. That the petition for removal to the United States Court was made by but two of the contestants, *and on their own behalf.*

g. And that but two of the contestants joined in the writ of error.

It is the first time, we think, that the question of such a removal under the *Removal Acts* has been directly presented to this Court.

I.

To sustain the petition for removal the contestants must show that the right is given by the so-called *Removal Acts*, as the jurisdiction of the United States Circuit Court is dependent upon them.

We insist that no such right has been conferred.

ACTS OF CONGRESS.

The principal Acts referring to the subject are:

The Judiciary Act [*Act of 1789*] §§ 11, 12.
The Act of 1866 [*14 Stat. at Large, p. 306*].
The Act of 1867 [*14 Stat. at Large, p. 558*].
The Act of 1875 [*18 Id., p. 471*].
[*See Dillon on Removal of Causes, 3d Ed., pp. 9-11*].

The first three of said Acts, though technically repealed by the United States Revised Statutes, are substantially re-enacted in the 639th section thereof.

Dillon on Removals, 3d Ed., p. 9.

First. As to the NATURE *of civil suits that may be removed.*

The language of section 639 of United States Revised Statutes on this point is: "Any suit * * * wherein the amount in dispute * * * exclusive of costs exceeds the sum or value of $500."

The language of the Act of 1875 (Sec. 2) is: "Any suit of a civil nature at law or in equity * * * where the matter in dispute exceeds, exclusive of costs, * * * the sum or value of $500, in which there shall be a controversy," etc.

All legislation on this subject has referred to the same class of cases.

The question then arises, is a proceeding to probate a will "a suit of a civil nature at law or in equity?" If not, then the United States Circuit Court has no jurisdiction over such a proceeding.

The very nature of a probate proceeding is opposed to the idea of "a civil suit at law or in equity." It is a proceeding *in rem.*, viz., whether a certain paper writing is a will or not.

It is a statutory prerogative proceeding to determine the status of a deceased man's estate. In no sense whatever can it be regarded as a contentious litigation *inter partes*, and its nature can never be changed until after the final probate.

From its peculiar nature such proceedings have always belonged to the exclusive jurisdiction of Probate Courts in this country, and in the Ecclesiastical Courts of England, in the absence of express statutes.

The special purpose of said Courts is to gather in the assets of estates, to distribute them amongst the legal owners, and to provide for the payment of debts. Their duties are chiefly administrative.

Probate proceedings were not matters of common law or equity cognizance, but appertained exclusively to Canon or Ecclesiastical law.

2 Black. Com., p. 508.
1 Williams on Exec. Margl., pp. 253, 341, 476, 487.
Armstrong v. Lear, 12 Wheat., 169.
Holbrook v. Campau, 22 Mich., 288.

In *Holbrook vs. Campau*, a bill was filed in the State Court on the equity side to restrain the action of administrators.

The Supreme Court say:

"Estates of deceased persons are not settled in equity under our laws, nor can the court of chancery interfere to remove administrators for abuse of their trust. * * * We have no doubt that jurisdiction in those courts was meant to be *exclusive*, except as the court of chancery may render aid by means of auxiliary remedies."

22 Mich., 288.
People v. Wayne Circuit Judge, 11 Id., 394.

While said Courts had no jurisdiction over real estate, yet the will when probated was received in other Courts only as a muniment of title.

The Massachusetts Courts, in discussing this question, call the probate of a will, *a suit within the meaning of the Statute.*

In *Haven v. Hilliard*, 23 *Pick.*, 19, Chief Justice *Shaw*, in discussing the nature of the Probate Court of Massachusetts, and from which State the Michigan Statute is taken, says: "THE PROCEEDINGS IN A PROBATE COURT SEEKING THE PROOF AND ESTABLISHMENT OF A WILL OF LAND IS A SUIT AT LAW WITHIN THE MEANING OF THE STATUTE."

He also refers to *Amory v. Fellowes*, 5 *Mass.*, 229, and quotes the following language of Mr. Chief Justice *Parsons:* "In the Probate Court, when the *lis contesta* is upon the execution of a will, the will as the foundation of the suit must be present in court before a *dedimus* can issue. The offering of the will for probate is the institution of the suit. It is a suit by which all titles to real estate by devise are to be settled." The executor is the party on one side, and the contestants the parties on the other.

In the Matter of *Penniman* Will, a question arose as to whether the order of a Probate Court admitting a will to probate was to be regarded as a judgment under the Statute.

After full discussion, the Court say: "The order of the Probate Court is to be regarded as a judgment within the meaning of the Statute, because it is the *final determination* of an action in that Court, to try and determine the issue as to the validity of the will."

[1] *20 Minn. 245.*

It will be observed that in the above decisions the probate of a will is called a suit *within the meaning of the Massachusetts Statute*, as though distinguishing between it and a suit at law or equity.

We, however, maintain that while there is a determination of a proceeding, yet it does not come within the meaning of suits at law or equity.

So anomalous and exceptional is the nature of probate jurisdiction, that courts of chancery in the absence of special legislation will not entertain a bill to avoid a will on the ground of fraud, mistake or forgery.

1 Story Eq. Jur., 10th Ed.. §184. Note 1, reviewing the cases—
also see §530.
Armstrong v. Lear, 12 Wheat., 169.
Gaines v. Chew, 2 How. U. S., 619. 645, 647.
Broderick's Will, 21 Wall., 514.
Gaines v. N. O., 6 Wall., 642.
Tarver v. Tarver, 9 Peters, 174.
Gaines v. Fuentes, 92 U. S., 21.

As the powers of Probate Courts in the United States are much more ample than those of the Ecclesiastical Courts of England, the doctrine laid down in the English decisions has been much modified by our own Courts.

Mr. Story, in discussing this subject says: "Hence, in this country, courts of equity do not ordinarily interfere in the administration of estates, and then only in aid of the courts of probate and for the accomplishment of some specific end not readily attainable in such courts, after which the cause is remanded to the Probate Court with the decree of the court of equity and becomes a part of the proceedings there, that the final settlement of the estate may remain in that Court.

1 Story, Eq. Jur., [10th Ed.] §543.

EXCEPTIONS.

The exceptions are:

a. Where the State law permits a chancery proceeding, as in Louisiana and Alabama.

b. Suits against administrators, etc., to account.

1 Story Eq. Jur., §§184, 530.
Suydam v. Broadnax, 14 Pet., 67.
Thompson v. Brown, 4 Johns Ch., p. 631; 609.
Yonley v. Lavender, 21 Wall. 279.
Hook v. Payne, 14 Id., 254.
Payne v. Hook. 7 Id., 425, 431,

c. Bills to establish or construe wills.

2 Story Eq. Jur., §§ 1445 to 1449.

But the argument does not involve a consideration of the power of courts of equity, as the sole question here is as to the "*probate of a will*," and to which those courts have never extended their jurisdiction.

It seems to us, therefore, that in view of the nature of the probate of a will, as well as a fair reading of the language of the Judiciary Act of 1789, and all subsequent legislation, that it is quite evident that in the framing of the Acts of Congress, the probate of a will was not in the mind of the legislator.

II.

PROBATE JURISDICTION IN U. S. COURTS.

The United States Supreme Court has expressly decided that the United States Circuit Courts have no jurisdiction over the probate of wills, for the reason that it is a proceeding *in rem*, belonging peculiarly to the control of Probate Courts and subject to the revisory power of State Courts.

The reasons given apply equally against the jurisdiction of the United States Circuit Courts, on removal from State Courts.

Gaines v. Fuentes, 92 U. S. Sup. Ct., 21.
Broderick's Will, 21 Wall., 514 S. C., 20 Cal. 266.
Yonley v. Lavender, 21 Wall., 276.
Tarver v. Tarver, 9 Peters, 174.
Gaines v. N. O., 6 Wall, 642.
Fouvergne v. N. O., 18 How., 470.
Adams v. Preston, 22 How., 473, 488.
Fuentes v. Gaines, 1 Woods, C. C., 116.
Du Vivier v. Hopkins, 116 Mass., 125.

In *Gaines v. New Orleans*, 6 *Wall*, 642, the bill in the United States Circuit Court charged fraud in the probate of a will, and prayed for its revocation and for discovery.

The Court say "that the probate of a will duly admitted to probate by a State Court of competent jurisdiction is conclusive of the validity and contents of the will in the United States Courts."

In *Tarver v. Tarver*, 9 *Peters*, 174, the bill in the United States Circuit Court of Alabama alleged that the probate of a certain will was void, and prayed that it might be canceled.

The Court held that an original bill would not lie for such a purpose, and that if any error was committed in the Probate Court it should have been corrected by appeal to the State Court.

In *Fuentes v. Gaines*, 1 *Wood, C. C.* 112, an injunction bill was filed to stay proceedings in the United States Circuit Court of Louisiana.

Mr. Justice *Bradley* held "that the United States Circuit Court had no probate jurisdiction where the direct object of the proceeding is the granting a revocation of probate, but that it was otherwise when the validity of the will comes up incidentally on a question of property, and even then it was confined to cases where by the laws of a State the probate was not conclusive upon those not made parties to the probate proceeding."

In *Armstrong v. Lear, administrator*, 12 *Wheat.*, 169, the bill was filed in the United States Circuit Court against the will annexed, for the purpose of establishing administrator, with a right to a bequest. The will had not been admitted to probate.

Mr. Justice *Story*, delivering the opinion of the Court, said: "By the common law the exclusive right to entertain jurisdiction over wills of personal estate belongs to Ecclesiastical Courts, and before any testamentary paper can be admitted in evidence it must receive probate in those Courts."

In *Picquet v. Swan*, 4 *Mason, C. Ct.*, 461, *Story*, J., says: "No other Court can entertain the question of the validity of a

will, directly or indirectly, whether it be a Court of Law or Equity."

In *Fouvergne v. New Orleans*, 18 *How.*, 471, plaintiff filed a bill to recover a share of an estate, charging fraud in the probate of a will. This Court held: "The Courts of the United States have no probate jurisdiction, and must receive the sentence of the courts to which the jurisdiction over testamentary matters is committed." * * *

In *Gaines v. Chew*, 2 *How.*, 919, the bill was brought for the purpose of revoking a certain will alleged to have been probated through fraud, and to give effect to a subsequent will. Under the law of Louisiana the Court of Probate has exclusive jurisdiction over the proof of wills. In this case the Court held "that in certain cases a Court of Equity may compel parties to go before the Probate Court and consent to the proof of a will."

In *Yonley v. Lavender*, 21 *Wall*, 279, this Court held that the several States of the Union necessarily have full control over the estate of deceased persons within their limits.

In *Gaines v. Fuentes*, 92 *U. S. Supt. Ct., p.* 21, 22, this Court held that the Federal Courts have no probate jurisdiction referring particularly tothe *establishment of wills* under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one in *rem*, which does not necessarily involve any controversy between parties; that from its nature, and from the want of parties, * * * *or the fact* that all the world are parties, the proceeding is not within the designation of cases at law or equity between parties of different States, of which the Federal Courts have concurrent jurisdiction with the State Courts under the Judiciary Act. But whenever a controversy in a suit between such parties respecting the validity or construction of a will,

or the enforcement of a decree admitting it to probate, there is no reason why the Federal Courts should not take jurisdiction of the case.

III.

MEANING OF THE TERM "*SUIT.*"

The terms "*any suit of a civil nature at law or equity,*" under present legislation, must be construed to embrace all litigations between party and party, which, in the English system of jurisprudence, under the light of which the Judiciary Act as well as the Constitution was framed, were embraced in all the various forms of procedure carried on in the ordinary law and equity courts *as distinguished from the Ecclesiastical, Admiralty and Military courts of the realm.*

Mr. *Story* says that cases in law or equity are those instituted according to the regular course of judicial proceeding.

2 Story Const., § 1646

IV.

VALUE OF THE MATTER IN DISPUTE.

In this connection, we call the attention of the Court to the language of the Act of Congress as to the amount in dispute:

"That the amount in dispute, exclusive of costs, *shall* exceed the sum or value of $500."

This language is descriptive of the nature of suits that may be removed. It constitutes an indispensable element of removability. The subject matter of the dispute or of the suit, must be property or money or some right, the value of which, *in money*, is susceptible of judicial ascertainment.

In *Gaines vs. Fuentes*,[1] the Court say:

"A controversy was involved in the sense of the statute, whenever any property or claim of the parties capable of *pecuniary estimation* was the subject of the litigation, and *was presented by the pleadings* for judicial determination."

[1] *92 U. S. Sup. Ct., p. 20. And see*
Dillon on Removal, 3d Ed., p. 63; note 2 and cases cited; also p. 105.
Pratt v. Fitzhugh, 1 Black., p. 272.
DeKrafft v. Barney, 2 Black., 714.

The value of the matter in dispute for the purposes of removal, is to be determined by reference to the amount claimed in the *pleadings.*

It is not enough that it appears in the petition; it must be shown by the petition and the record.

The motion to remand must be based upon the petition for removal and the record, as sent up from the State Court.[1]

The record in this cause shows no statement of value within the meaning of the Act; and in the nature of the proceedings could not. Until the filing of an inventory and the ascertainment of the debts of the deceased, the value of an estate could not be known.

[1] *Dillon on Removal, 3d Ed., p. 62, §§ 50, 51; also p. 104, § 86, Note 1.*

In the probate of a will, the question of the value of the amount in dispute has no place whatever, and forms no part of the issue. It is a mere question whether it is a legal will or not. The paper to be probated is not a pleading, but the mere evidence of a man's desires, and in most cases does not indicate, and could not, the value or nature of the property sought to be devised.

A will that should bequeath and devise all of the real and personal estate of the testator, might represent one hundred dollars or one million dollars.

In *Tibbatts v. Berry*, 10 *B. Monroe*, 475, Chief justice *Marshall* said: "That the proceedings for the probate of wills

presents the question of will or no will, *not as a mere question of property*, but as an abstract question.

But as there are no pleadings in the strict sense of the term in a proceeding to probate a will, the record can show nothing concerning the value of the matter in dispute. We therefore say that neither the proceedings in the Probate Court nor the alleged pleadings after the appeal to the Circuit Court, contain any evidence or statement of value.

If this be so, it is another reason why the proceeding in question cannot be removed.

V.

But the contestants say that from the nature of Probate Courts, no issue can be formed, for the reason that there can be no litigation *inter partes*.

With this proposition we take issue, and call the attention of the Court to the Constitution and Statutes of Michigan on the subject.

Under the provisions of the Constitution and Statutes of Michigan the Probate Court is made a court of record. It has a seal and clerk, with regular terms of court, and its proceedings are duly entered of record. It is also a *State Court*. It has exclusive jurisdiction over the probate of wills. Its orders and decrees are binding until reversed, and provisions are made for appeals therefrom to the State Courts.

Art. VI., Sec. 1, of the Constitution, provides that "The judicial power is invested in one Supreme Court, in Circuit Courts, and in *Probate Courts* * * * ."

[*1st Vol. Comp. Laws of Mich., 1871, p. 61.*]

Section XX., of the same Article, provides that:

"The Supreme Court, the Circuit and Probate Courts of each county shall be courts of record, and shall each have a common seal."

"Every Judge of Probate shall hold a Probate Court in his county * * and may adjourn from time to time." * * *

2 Comp. Laws 1871, Ch. 177, §§ 5192, 5231.

"Every Probate Court shall be a court of record; shall keep a true record of each order, sentence and decree * * * and of all wills proven, and the probate thereof."

2 Comp. Laws, Ib., 1871, § 5193.

In *Church v. Holcomb*[1], our Supreme Court have decided "That the Probate Court is one of *general* jurisdiction in testamentary and other probatory matters."

1 45 Mich. R., 39.

"The Judge of Probate for each county shall have power to take the probate of wills" * * * [*Ib.*, §§ 5196–]; "shall have jurisdiction of all matters relating to the settlement of estates" [*Ib.*, § 5197]; "may commit for contempt" [*Ib.*, §§ 5200, 5203]; "appeals may be taken from any sentence, order or decree" [*Ib.*, § 5217]; "each Judge of Probate may appoint a clerk" [*Ib.*, § 5237].

"When any will has been delivered into or deposited in any Probate Court * * * such Court shall appoint a time and place for proving it, when all concerned may appear and *contest* the probate thereof, and shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of Court * * * and no will shall be proven until notice shall be given * * * ."

2 Comp. Laws 1871, § 4338.

"If none of the subscribing witnesses shall reside in the State at the time appointed for proving the will, the Court may, in its discretion, admit the testimony of other witnesses to prove the sanity of the testator." * * *

2 Comp. Laws 1871, § 4340.

From the foregoing statutes we insist that provision is expressly made for a contest between parties in the *probate of a will*, though not after the course of the common law. But at the same time we insist that from the nature of the proceeding it is not a suit at law or equity, and neither can the mere probate of a will ever be converted into a suit.

VI.

EFFECT OF APPEAL FROM PROBATE COURT.

Again:

But it is further urged by the plaintiff in error that, admitting that the proceeding before the Probate Court is not such an action as is provided for in the "Removal Acts," yet that it is only after the appeal to the State Court an issue can be formed, and which then constitutes a suit *inter partes*, thus bringing the case for the first time within the provisions of said Acts.

Now, while from the nature of the proceedings in such courts common law proceedings are inapplicable, yet they are still regularly organized courts but acting according to the methods adopted by Ecclesiastical courts.

We therefore say that, from the nature of the proceeding, the appeal to the Circuit Court neither changed the character of the proceeding, nor the issue in the Probate Court. The order appealed from was an order probating the will of A. D. Fraser, deceased. The issue in the State Court was identical with that made in the Probate Court, viz.: The mental capacity of the testator and the proper execution of the will; in other words, the testamentary quality of the paper exhibited for probate.

The proceeding was no more one between parties than it was before.

Lingan vs. Henderson, 1 Bland Ch., 236.

The following decisions of the Michigan Supreme Court have given construction to the character of proceedings before the Probate Courts.

In *Amer. Bap. Union v. Peck*, 9 *Mich.*, 446, an appeal was taken from a decree of the Probate Court, admitting a will to probate, to the State Circuit Court. *No new issue was framed in the Circuit Court.* Exceptions were taken to the rulings on

the trial in the Circuit, and error was alleged. In the Supreme Court a motion was made to dismiss, on the ground that the proceedings were not according to the course of the Common law.

The Court say:

"Upon appeal from the decree of a Probate Court allowing or disallowing a will, the substance of the controversy must be the same as on the issue of *devisavit vel non;* and presents of necessity an issue peculiarly proper for trial in the ordinary way.

"While a new issue may be very properly made in the Circuit Court in a common law form, yet it can not differ materially from that necessarily made on the application for probate, which with us is usually somewhat informal, but which if made with full allegations would present all the issues in form which are now comprehended in substance in every such application."

See also Comstock v. Smith, 26 Mich., 322-3.

In *Conrad v. Button*[1], an appeal was taken from an order of the Probate Court for the removal of an administrator.

The Supreme Court say: "Proceedings before the Probate Court for the removal of an administrator are not according to the course of the common law, and *their nature is not altered* when the cause is removed by appeal to the Circuit Court, and a writ of error does not lie to review them.

The inquiry is one of a peculiar and exceptional character, and which ought to be conducted with all reasonable celerity, and the law does not contemplate that the settlement of estates shall be procrastinated and embarrassed by reviews of such matters on writ of error.

[1] *28 Mich., 365; also see Churchill v. Burt, 32 Id., 490.*

In *Allison v. Smith*[1], the Supreme Court say: "The probate of a will is not a proceeding of party against party, but one intended to pass upon the testamentary qualities of the papers exhibited for probate, and to ascertain and adjudge the status of the estate.

"It is a proceeding *in rem*, and is conclusive against all the world while unrevoked."

[1] *16 Mich., 416, 417; also see Allen v. Dundas, 3 Term R., 125.*

This point was expressly decided by the Michigan Supreme Court in the present "Fraser Estate."

The State Court having ordered a consolidation of the two appeals already mentioned, the contestants applied for a *mandamus* to vacate the order.

The Court say:

"The order was entirely unnecessary, as the case was a single one and not capable of division. The proceedings in the State Circuit Court are *precisely like those in the Probate Court*, viz., statutory prerogative proceedings to determine the *status* of a dead man's estate, and in no sense to be regarded as contentious litigation *inter partes*. * * * That the probate of every will, whether in the original *or appellate* tribunal, must always be single and complete in one hearing. * * * That no matter how many different persons appeal, they can only raise one issue, and there can be but one trial of that issue, which is to determine the question of will or no will. * * * That there can be no such thing as a determination of testacy or intestacy, which binds one appellant and does not bind the rest."

Fraser v. Wayne Circuit Judge, 39 Mich., 198.

It will be observed that the State Court in the foregoing decision decide that the probate of a will can not be regarded as litigation *inter partes*, either in the probate or the appellate court, and hence the position of the plaintiff in error on this point is expressly met.

In the latest Michigan case, *Hathaway's Appeal*, 46 *Mich.*, 327, no formal issue had been framed, and proponents counsel proposed to proceed on the appeal papers as they came from the Probate Court. The Supreme Court held:

"That the issue or issues were inherent, and it was not a necessary expedient to attempt to reduce them into written forms. That the inquiry can neither be enlarged nor contracted by the pleadings. There is one main issue, and one only, and that is whether the paper propounded is, or is not a will."

This is an express construction by the court of last resort of the Michigan probate statutes in the case at bar, and is conclusive on this point.

We therefore say that the record neither shows a *final judgment in a civil action*, as mentioned in section 691 of the

United States Revised Statutes, nor a *suit*, as mentioned in section 5 of the Act of March, 1875. And hence there is no ground for removal.

It is worthy of notice that there is no analogy between this kind of appeal and that from a Justice of the Peace, or a chancery appeal.

There the Court below not only sends up its entire record, but its jurisdiction ceases. But on the Probate appeal, in Michigan, only a part of the record is removed. The Court also retains certain powers over the proceedings, viz: It may appoint a special administrator, with the powers of a general administrator, and proceed in the case.

Section 4381, of the Compiled Laws of 1871, reads as follows:

"WHEN THERE SHALL BE A DELAY IN GRANTING LETTERS OCCASIONED BY AN APPEAL FROM THE ALLOWANCE OF A WILL, THE JUDGE OF PROBATE MAY APPOINT AN ADMINISTRATOR TO ACT AND TO TAKE CHARGE OF THE ESTATE UNTIL, ETC., * * AND NO APPEAL SHALL BE ALLOWED FROM SUCH APPOINTMENT."

But, admitting the counsel's argument, that an issue is first formed in the State Court on appeal, we insist that from the structure of the United States Circuit Courts they have no jurisdiction over causes appealed to the State Courts.

The Acts of Congress provide that when a case is legally removed into the United States Circuit Courts, the jurisdiction of the State Courts over it ceases; and the suit is thenceforth to proceed to trial, judgment and execution in the Federal Courts, and cannot afterwards be removed to the State Courts for any purpose, for, in the language of the Act, "it must proceed as though it had been originally commenced there."

As before stated, such removal does not change the nature of the issue to be tried, or of the judgment to be rendered.

The United States Circuit Court could not transmit any certificate of its judgment to the State Courts, because it is not an *appellate tribunal*. The removal of a case from a State

Court into the United States Circuit Court for trial has no analogy in the taking up of a case by writ of error from the highest State Court to the Supreme Court of the United States.

There is therefore no form in which any judgment of the Circuit Court could be legally carried into execution.

DuVivier v. Hopkins, 116 Mass., 128-9.
Stevenson v. Williams, 19 Wall., 572.

Again:

Another serious objection presents itself against a removal from the State Appellate Court.

Under the United States Revised Statutes, Section 639, Subdivision 3, the party removing the cause is required to file in the Federal Court,

"Copies of the said process against him, and of all pleadings, depositions, testimony or other proceedings in the cause." And "when the said copies are entered as aforesaid in the Circuit Court, the cause shall then proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect in every respect, and for every purpose as the original pleadings would have had by the laws and practice of such State, if the cause had remained in the State Court."

The provisions of the Act of March, 1875, [Sections 3, 6] are substantially the same. The obvious purpose of this legislation, was that the Federal Court should take up the cause where it was when it left the State Court, where it originated, and proceed with it as if it had been *originally* brought in the Federal Court, and complete the matter.

On reference to the Statutes of Michigan, authorizing appeals from the Probate Court, it will appear that the removal of the record in the State Circuit Court could not be accomplished, as the provisions of the Acts of Congress above cited, could not be complied with.

"The person appealing shall procure and file in the Circuit Court * * * a certified copy of the record or proceedings appealed from, etc. * *"

2 Comp. Laws, § 5219.

"When such certified copy shall have been filed, * * * such Court shall proceed to the trial of the question according to the rules of law, and if there shall be any question of fact to be decided, issue may be joined thereon, under the direction of the Court, and a trial thereof had by jury.

Ib., § 5220.

From the foregoing it appears that a certified *copy of a part* of the probate record is carried up by the appeal to the State Court, the will and original record remaining in the Probate Court. The record then to be removed to the United States Circuit Court would be but a *copy of certain copies* of a part of the original record.

Act of 1875, Sub. 3.

Again:

The State Circuit Court is invested with large discretionary *revisory* powers over the probate proceedings, specially adapted to this class of cases, and which gives additional force to the objection against removal. For the purpose of promoting dispatch and to prevent oppressive burdens the statute provides:

"The Circuit Court may reverse or affirm, in whole or in part, the *sentence* or *act* appealed from, and may make such order or decree thereon as the Judge of Probate ought to have made, and may remit the case to the Probate Court for further proceedings, or may take any other order thereon as law and justice shall require."

2 *Comp. Laws of Mich., 1871*, § 5226.

The United States Supreme Court, recognizing the object of this supervisory power, have refused to entertain an appeal from a decree of the United States Circuit Court exercising supervisory jurisdiction under the Bankrupt Act.

Bankrupt Act 1867, § 2 [*14 Stat. at Large, 518*].
Morgan v. Thornhill, 11 Wall., 65.
Coit v. Robinson, 19 Id., 274.

By the second section of the Bankrupt Act of March 2d, 1867—[14 *Stat. at Large, p.* 518]— it is provided:

"That the several Circuit Courts of the United States within the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this Act, and, except where otherwise provided, may, upon bills, petitions, etc., * * * hear and determine the case, as in a court of equity."

In *Morgan v. Thornhill*, 11 *Wall.*, 65, above cited, it was held that under the foregoing section no appeal lies from a decree of the Circuit Court of the United States to this Court.

Also see Coit v. Robinson, 19 Wall., 274.

If, therefore, a removal can be made from the State Appellate Court to the United States Circuit Court, the "Will" would remain in the Probate Court, as well as the unreversed decree of that Court admitting it to probate. And, whatever the judgment of this Court, the decree of the Probate Court would still remain unreversed, because this Court has no appellate jurisdiction over the State Court; and the Act contemplates that this Court shall proceed as though the case had been originally brought here. The record being an appeal record, what judgment could it make, and how could it be made effective? The result would be a barren verdict. The operation of the will would be suspended, and the machinery of the State Courts brought to a full stop.

Even could a removal be made, the anomaly would follow that each Court may try the validity of the Will independently of the other in the absence of indispensable parties, and with opposite results.

Considering the nature of a Will, and the necessary consequences from such a result, Courts will hesitate long before aiding such a conclusion.

From the foregoing it is quite evident that, from the subject matter, the special powers and machinery necessary to enable the Probate Court to administer upon estates, as well as the absence of all Congressional legislation upon the subject, especially the want of appellate jurisdiction of the United States Circuit Courts over the State Court, it is impracticable for the United States Courts to assume such a jurisdiction, and it was never intended that they should.

VII.

But if the United States Circuit Court have jurisdiction in this class of cases, the Acts of Congress only authorize a removal from the Court of original jurisdiction, in which the suit is begun, to wit the Probate Court, and not after an appeal therefrom, as in the present case.

We have already stated on page 14 that Probate Courts in Michigan are courts of record, and of general jurisdiction in testamentary cases. An analysis of the various Acts of Congress clearly sustain our position as to the *time* when a removal may be made in the Court where the suit is commenced, viz.:

"At time of entering appearance."—*Judiciary Act of 1789, U. S. Rev. Stat.,* § *639.*

"At any time before the trial or final hearing."—*U. S. Rev. Stat.,* § *639, Sub. 2.*

"Before or at the term at which said cause could be first tried, and before trial."—*Act of 1875, Sub. 2* [*18 Stat. at Large, p. 470*].

Stevenson v. Williams, 19 Wall., 572.
Vannevar v. Bryant, 21 Id., 41.
Craigie v. McArthur, 4 Dillon C. C., 474.
Lowe v. Williams, 94 U. S. 650.

Were it otherwise, the United States Circuit Court could not "proceed in the same manner as if it had been *originally* commenced in such Court"

U. S. Rev. Stat., § *639, 18 Stat. at Large,* § *3,* [*Laws 1875, p. 470*].

And which could not be done without setting aside the decree of the Probate Court, and which the United States Circuit Court has no power to do.

The case of *Craigie v. McArthur*, above cited, was a proceeding by the heir for a final accounting and distribution, before the Probate Court in Minnesota.

An appeal was taken from a decree granting the petition

to the State Court, and where a petition was filed for a removal under the Act of 1875. A motion to remand was made in the United States Circuit Court, on the ground that the petition for removal should have been filed in the Probate Court.

Mr. Justice *Nelson* (*Dillon* J., concurring) held "that while the *probate of a will* might not be a proper subject to be determined in the Federal Courts, yet, when the estate is ready for distribution a removal is then authorized, as the essential elements of a controversy exists."

In the case at bar due notice of hearing was given by the Probate Court. The proponents produced the will and their witnesses. The contestants contested the same by counsel, and after argument the Court made an order admitting the will to probate.

Now, whatever view may be taken of Federal jurisdiction over the probate of wills, yet, if the proceeding be removable at all, the petition must be filed in the Probate Court, as that is the tribunal where, in the language of the Act of 1875, "*the cause could first be tried.*"

VIII.

It was urged in the Court below that the issuing of a *certiorari* to the State Court for the purpose of bringing up the full record was equivalent to a waiver of any objection as to the time of filing the petition. The proponents were not actors in the matter. The order directing the issuing of the writ was made by the Federal Court *sua sponte*. Besides, the Act of 1875, Section 5, expressly authorizes the United States Circuit Court to issue such writ.

IX.

The Act of 1875 provides that any suit in which there is a controversy between citizens of different States might be removed, and that "when in any suit * * there shall be a

controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove such suit." * *

Vannerwas v. Bryant, 21 Wall, 41.
Sewing Machine Cases, 18 Id., 553.
Bixby v. Couse, 8 Blatch., 73.

In this case, Mr. Fraser and his executors were citizens of Michigan; the proponents of the will and four of the contestants were citizens of Michigan, while two of said contestants were citizens of Illinois and Iowa respectively. Under the law of 1875, then, this case could not be removed.

But the plaintiff in error insists that as regards citizenship the case was removable under the Act of 1866.

That Act provides "that if so far as it relates to the moving party it must be brought for the purpose of restraining or enjoining them; or if the suit was one in which there could be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause."

In reply we say, as said before, that there could be no final determination of this cause without the presence of all the proponents and contestants, for the reason that the issue is indivisible, viz., Will or no Will.

[1] *Shields v. Barrow, 17 How., 130.*

X.

The Act of 1875 contemplates the removal of the entire suit. The language is: "Either party may remove *such suit.* * * The Court shall proceed no further *in such suit.*" The term "*party*" is collective, and means all the plaintiffs and all the defendants, and that all on each side must be citizens of different States from those on the other side.

The suit in this case is the removal of a will, and the subject matter is indivisible. The remaining four contestants are just as necessary parties as the plaintiffs in error.

Osgood v. Chicago, D. & V. R. R., 6 Biss. (U. S.) 330.
Mayo v. Taylor, 8 Chicago Leg. News, 10.
Chicago v. Gage, 6 Biss. (U. S.) 467.
Stapleton v. Reynolds, 9 Chicago Leg. News, 33.
Mitchell v. Tillotson, 12 Fed. Rep., p. 737.
Price v. Foreman, Id., 801.

FINALLY.

The petition for removal then did not contain facts sufficient to oust the State Court of its jurisdiction.

The right of removal being statutory, before a party can avail himself of it he must show upon the record that his case comes within the provisions of the Statute. His *petition*, when filed, becomes a part of the record in the cause. It should state facts which taken in connection with such as already appear entitle him to the transfer.

Ins. Co. v. Pechner, 95 U. S. Snp. Ct., pp. 185, 186.

The writ of error should be dismissed with costs.

WM. JENNISON,
Solicitor and Counsel for Proponents.

Detroit, October, 1882.

CHRONOLOGICAL ABSTRACT OF RECORD.

1877, Aug. 8. Will filed in Probate Court for Wayne County, Michigan, and order published for hearing. *Record, p. 4.*

" Oct. 29. Notice to Probate Court by all of the contestants, six in number, of their *appearance* and intention *to contest* the probate of the Will. *Record, p. 14.*

" Nov. 9. Decree of Probate Court reciting the hearing and contest of the Probate, and admitting Will to Probate. *Record, p. 4.*

" Dec. 31. Petition to Probate Court by Alex. and Francis P. Fraser, claiming an appeal to State Court, also bond filed. *Record, p. 5.*

" Dec. 31. Petition to Probate Court by remaining four contestants, claiming an appeal to State Court. *Record, pp. 23, 24.*

1878, Jan. 5. Order reciting the claim of appeal of plaintiffs in error from the decree of the Probate Court, and allowing same. *Record, p. 6.*

" Jan. 5. Order reciting the claim of appeal of Michigan contestants from the decree of the Probate Court. *Record, p. 25.*

" Mar. 4. Order by State Circuit Court that the parties contestants file their objections in both appeals to the probate of said Will. *Record, pp. 7, 8.*

" Jan. 25. Jury demanded in each case. *Record, pp. 9, 28.*

" Apr. 17. Notice served by contestants, Alexander and Francis P. Fraser, that petition for removal to U. S. Circuit Court had been filed, and that the State Court would be asked *April 22d* to approve of the Bond. *Record, pp. 10, 11.*

" Apr. 18. Notice by proponents of Will that application would be made to the State Court, that the transcript of the Probate Court record be amended by filing the notice of appearance of all contestants filed in the Probate Court. *Record, p. 13.*

" May 6. Order made by State Court that notice of appearance of the contestants in the Probate Court be filed in State Court. *Record, p. 12.*

" May 6. Order by State Court that Bond on removal to United States Circuit Court be refused. *Record, p. 12.*

" June 10. Order by State Court that said two appeals be consolidated. *Record, p. 29.*

" " 8. Motion in United States Circuit Court to remove record and proceedings to State Court. *Record, p. 15.*

" " 13. Court orders that *certiorari* issue to State Court to bring up remainder of record. *Record, pp. 17, 18.*

" Nov. 5. Order to remand granted. *Record p. 32.*

" July 16. Writ of error to United States Circuit Court. *Record, p. 1.*

Supreme Court.

OF THE

UNITED STATES

OCTOBER TERM, 1882.

No. 72.

William Jennison, **William A. Moore,** **William Adair and** **John Pettee,** *Defendants in Error.* ads. **Alexander Fraser and** **Francis P. Fraser,** *Plaintiffs in Error.*	*Error to the Circuit Court of the United States for the Eastern District of Michigan.*

BRIEF OF WM. JENNISON,

For Defendants in Error.

WM. JENNISON,
WM. A. MOORE,
Att'ys and of Counsel for Defendants in Error.

HENRY M. DUFFIELD,
Atty for Plaintiffs in Error.
EDWARDS PIERREPONT,
Of Counsel.

OFFICE SUPREME COURT U. S.
FILED
OCT 31 1882
JAMES H. McKENNEY

16-191

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ALEXANDER FRASER AND FRANCIS P. FRASER,
Plaintiffs in Error.
v.
WILLIAM JENNISON, WILLIAM A. MOORE, WILLIAM ADAIR AND JOHN PETTEE.
Defendants in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

SUPPLEMENTAL MEMORANDUM TO BRIEF FOR PLAINTIFFS IN ERROR.

In connection with quotation from the opinion of this Court in Gaines v. Fuentes, on p. 9 of Brief, I beg leave to call the attention of the Court to the following decision of the Supreme Court of Michigan in

Cook v. Holbrook, 5 Mich. R., p. 229.

"It is true Probate Courts are "courts of record," being declared to be such by the constitution, but they are not "courts of law," according to the ordinary use of the term. They derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in the instance of probate of wills, or when the power of appointment is to be exercised; and then no issues are joined by pleadings, no juries are known, and they render no judgments—their determinations being called orders, sentences, or decrees—and upon summary inquiry, with or without notice, as the case may be. If questions of fact, such as are the subjects of litigation at law, are to be determined within their jurisdiction; as, for instance, the allowance or disallowance of claims against an estate; they are generally determined through the action of commissioners appointed by the Court, and from their decision no appeal lies to the Probate, but does to the Circuit Court. Comp. L., §§ 2916, 2923, 2935, 2945. The orders and decrees of these courts are subject to review only in virtue of statutory provisions, and not of their inferior character (for, primarily, they are not courts of inferior jurisdiction, as justices' and Circuit Courts are); and the statute confers the power of review only upon the Circuit Courts, through an appeal, and thereby confers upon such courts superior jurisdiction."

HENRY M. DUFFIELD,

Attorney for plaintiffs in error.

Full set on receipt 16-196

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~219.~~ 25

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GEORGE W. P. C. LEE.

No. ~~220.~~ 24

FREDERICK KAUFMAN AND RICHARD P. STRONG, PLAINTIFFS IN ERROR,

vs.

GEORGE W. P. C. LEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED JULY 28, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 219.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GEORGE W. P. C. LEE.

No. 220.

FREDERICK KAUFMAN AND RICHARD P. STRONG, PLAINTIFFS IN ERROR,

vs.

GEORGE W. P. C. LEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
Petition for certiorari	1	1
Certiorari	8	6
Second petition	10	7
Record from State court	16	10
Declaration	17	11
Notice	22	13
Rule	36	18
Suggestion and motion	51	23
Order for rule on same	55	26
Rule thereon	56	27
Notice of motion for hearing	57	27
Stipulation to continue, &c	59	28
Answer to rule	61	29
Denial of motion to remand	63	30
Opinion of court upon demurrer	64	31
Order sustaining demurrer to suggestion	76	59
Order for special jury	77	60
Plaintiff's disclaimer of title, &c	78, 93	61, 72
Withdrawal of claim for mesne profits	79	61
Opinion of court upon instructions asked	82	63

	Original.	Print.
Order of nonsuit	85, 197	69, 111
Verdict	87, 228	70, 122
Motion for new trial	89, 230	70, 123
Motion for new trial overruled, and judgment	91	71
Bill of exceptions	93	72

PAPERS REFERRED TO HEREIN.

Testimony of W. H. F. Lee	95	73
Testimony of Louis E. Payne	97	73
Will of G. W. P. Custis	98	74
Will of Mrs. Mary C. Lee	104	76
Deed of release to plaintiff from the heirs of Mrs. Mary C. Lee	109	78
Testimony of George R. Adams	113	79
S. B. Corbitt	115, 135	80, 90
Jefferson Tacey	115, 146	80, 94
Morton Marye	122	83
Certificate of tax sale	124	84
Testimony of John Hawxhurst	125, 160	86, 99
Frederick Kauffman	128	87
Richard P. Strong	128, 198	87, 112
Isaiah Brady	136	90
William C. Yeaton	139	91
John W. Burke	142	92
Reginald Fendall	144	93
Reuben Johnson	150	95
Edward W. Janney	154	96
William J. Boothe	156	97
John C. McQuinn	157	97
Appointment of A. Lawrence Foster as commissioner	159	98
Instructions prayed for	171	103
Petition of R. P. Strong	190	109
Record in case of Lee *vs.* Branham	204	114
Instructions to jury given by court	226	122
Stipulation as to bill of exceptions	231	123
Clerk's certificate	233	124
Letter of Secretary of War	234	124
Writ of error, Lee *vs.* United States	236	124
Citation, Lee *vs.* United States	237	125
Writ of error, Lee *vs.* Kaufman & Strong	239	125
Citation, Lee *vs.* Kaufman & Strong	240	126

1 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

In the circuit court of the United States for the eastern district of Virginia.

GEORGE W. C. LEE
vs.
FREDERICK KAUFFMAN AND OTHERS. } In ejectment.

Be it remembered that on this day, to wit, the 6th day of July, 1877, the said defendants filed in the clerk's office of said court their petition, praying that an action of ejectment brought against them by the said plaintiff in the circuit court of Alexandria County, Virginia, may be removed into the circuit court of the United States for the eastern district of Virginia; which said petition, with the endorsements thereon, is in the words and figures following, to wit:

Petition.

Circuit court of the United States, eastern district of Virginia.

To the honorable the circuit court of the United States held in and for the eastern district of Virginia, in the fourth circuit:

2 The petition of Frederick Kauffman, R. P. Strong, Tibbit Allen, Edward Austin, William H. August, Jerry Armistead, John Alexander, Julia Buckner, Charles Bailor, Joseph Brown, Stephen Bailey, Samuel Branham, Samuel Bowman, William H. Butler, Washington Bagby, Albert Brown, Charles Bailey, Randall Bates, John Burrill, James Brown, John T. Burgess, James Ball, Thomas Brown, Jerry Crutchfield, Charles Curtis, Fred Contee, Fielding Contee, Benjamin Cole, Robert Carter, George Coleman, John E. Curry, William Conway, Jacob Crawford, Daniel Carroll, Owen Chase, George Conway, Charles Cook, Julia Church, Richard Cliflins, Isaac E. Clinkitt, James Clinkitt, Henry Conway, Albert Dickerson, Thomas Dabney, Lewis Davenport, Peter Dade, Dennis Diggs, John Davis, Ephraim Elan, Paul Elms, James Fisher, Hiram Fleet, Elias Fox, Jacob Foster, Harrison Goldman, Newton Goldman, Daniel Green, William H. Gant, Daniel Goldman, Fred Goldman, George Green, Harrison Green, Arthur Green, Benjamin Green, Joseph Gardner, Oliver Gardner, William Grimes, William Harcum, Ruffin Holmes, Bernard Holmes, Henry L. Holmes, Benjamin Hines, Conway Hart, Abraham Hamerson, Daniel Hogan, Farmer Harris, Austin Harris, William Jones, Winston Jones, H. A. Jefferson, Henry Jones, Solomon Jackson, Robert Jourdan, Fannie Jackson, Cyrus Jackson, Charles Jackson, Carter Johnson, Richard Lewis, James Lewis, James H. Lane, Jefferson Lane, William H. Lomax, Henry Lomax, Sallie Lipsicomb, Willis Lewis, Henry Morton, Joseph Morgan, Isom Morrison, Henry Mitchell, Lucinda Moran, Wesley Norris, Dinah Nash, John Offord, Jerry Overton, Thomas Owens, John W. Pendleton, Dennis Pinn, Mrs. Plummer (widow of Elias Plummer), William Plummer, James Parks, Lawrence Parks, Nathan Pendleton, Lot Purnell, Benjamin Pollard, George Ransom, James H. Robertson, Dandridge Richardson, John Richardson, Jasper Richardson, Seymour Roy, Caroline Robinson, William A. Rowe, John Simmons, T. Elzey Slaughter, John Abraham Slaughter, Lewis Somerville, Reuben Somerville, Allen

Spencer, William E. Smith, Robert Smith, Nathaniel Smith, Martha Smith, Alexander Scott, Mrs. Scott (widow of Garland Scott), Nicholas Snow, Abraham Summers, Troy Shelton, Mrs. Spriggs (widow of Nathan Spriggs), Daniel Stewart, Maria C. Syphax, James Turner, John Toales, Quincey Taylor, Henry Thomas, Albert Turner, Spencer Tasker, James N. Tinson, Scipio Terry, John W. Ward, Benjamin Wright, Byron Webb, Fielding Washington, Edward Willis, James Washington, Willis J. Wormley, Nelson Wormley, Jacob Williams, John Williams, Simeon Wright, Cornelius West, John Wells, Isaiah Wilder, Jesse Watkins, Jerry Smith, and George Washington, respectfully shows:

That your petitioners were, on or about the twelfth day of April, A. D. 1877, served with copies of a declaration in ejectment, with notice unto appended that the same would be filed on the first Monday o- May, A. D. 1877, in the clerk's office of the circuit court of Alexandrif County, Virginia, within the said district. a

That such copies of said declaration and notice were served on
3 your petitioners in the said county of Alexandria, and within the territorial jurisdiction of said circuit court thereof, and within the said eastern district of Virginia; that by such service a suit has been commenced, but not yet heard or tried, against your said petitioners in the said circuit court of the county of Alexandria, and that the grounds of said suit and prosecution, as stated in said declaration, are that your petitioners did, on the sixth day of January, A. D. 1875, enter into certain premises of one G. W. C. Lee, the plaintiff in said suit, which said lands, are in said declaration described, and eject him, the said plaintiff, therefrom, and unlawfully withhold from him, the said plaintiff, possession thereof.

That the said suit and prosecution was commenced for and on account of a right and title to the lands in said declaration mentioned, set up and claimed by your petitioners under the revenue laws of the United States, that is to say, under a certain law thereof entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7th, 1862, and the several amendments thereto. That this petition is made
4 pursuant to section 643 of the Revised Statutes of the United States, which said statutes were approved June 22d, A. D. 1874.

Wherefore your petitioners pray that the said suit and prosecution may be removed into the circuit court of the United States for the eastern district of Virginia, in the fourth circuit, pursuant to the statute of the United States in such case made and provided.

And your petitioners will ever pray, &c.

Frederick Kauffman.
his
Joseph x Morgan.
mark.
his
Wesley x Norris.
mark.
his
John x Offord.
mark.
his
Jerry x Overton.
mark.
his
Thomas x Owens.
his
John Abraham x Slaughter.
mark.
his
William E. x Smith.
mark.
his
Nathaniel x Smith.
mark.
her
Martha x Smith.
mark.
his
Alexander x Scott.
mark.

mark.
John W. Pendleton.
his
Dennis x Pinn.
mark.
his
William x Plummer.
mark.
his
James x Parks.
mark.
his
Lawrence x Parks.
mark.
his
Nathan x Pendleton.
mark.
his
Lott x Purnell.
mark.
Benjamin Pollard.
James H. Robertson.
his
Dandridge x Richardson.
mark.
her
Caroline x Robinson.
mark.
William A. Rowe.
his
John x Simmons.
mark.
his
Wm. H. x Augustus.
mark.
his
Charles x Bailor.
mark.
his
Samuel x Branham.
mark.
his
Washington x Bayly.
mark.
his
Wm. H. x Butler.
mark.
his
Jerry x Crutchfield.
mark.
his
Ben x Cole.
mark.
his
Robert x Carter.
his
William x Conway.
mark.
his
George x Conway.
mark.
his
Richard x Cliflins.
mark.

his
Nicholas x Snow.
mark.
his
Abraham x Summers.
mark.
his
Troy x Shelton.
mark.
his
Daniel x Stewart.
mark.
his
Quincey x Taylor.
mark.
his
Henry x Thomas.
mark.
his
Albert x Turner.
mark.
his
Spencer x Tasker.
mark.
his
Scipio x Terry.
mark.
his
Edward x Austin.
mark.
his
Henry x Lomax.
mark.
her
Sally x Lipsicom.
mark.
his
Willis x Lewis.
mark.
his
James x Lewis.
mark.
his
Henry x Morton.
mark.
her
Lucinda x Moran.
mark.
his
Jasper x Richardson.
mark.
his
Lewis x Somerville.
mark.
his
Reuben x Somerville.
mark.
his
Henry x Jefferson.
mark.
his
Daniel x Goldman.
mark.

his
James x Clinkitt.
mark.
his
Albert x Dickerson.
mark.
his
Peter x Dade.
mark.
his
Elias x Fox.
mark.
his
Jacob x Foster.
mark.
his
Harrison x Green.
mark.
his
Arthur x Green.
mark.
his
Paul x Elms.
mark.
his
William x Harcum.
mark.
his
Conway x Hart.
mark.
his
Daniel x Hogan.
mark.
his
Farmer x Harris.
mark.
his
Austin x Harris.
mark.
his
Solomon x Jackson.
mark.
her
Fanny x Jackson.
mark.
his
Charles x Jackson.
mark.
his
Richard x Lewis.
mark.
his
Albert x Brown.
mark.
his
James x Ball.
mark.
his
John x Richardson.
mark.
his
John x Toales.
mark.

her
Mrs. Maria x Spriggs.
mark.
his
Allen x Spencer.
mark.
his
James x Washington.
mark.
his
Willis J. x Wormley.
mark.
his
Jesse x Watkins.
mark.
his
Jacob x Williams.
mark.

Jerry Smith.

his
Daniel x Green.
mark.
his
Washington x Jackson.
mark.

Ran. C. Bates.

his
T. Elzey x Slaughter.
mark.
his
James x Turner.
mark.
her
Julia x Buckner.
mark.
his
John x Davis.
mark.

Tibbett Allen.

his
Henry x Mitchell.
mark.
his
Benjamin x Green.
mark.
his
Dennis x Diggs.
mark.
his
Wm. H. x Gant.
mark.
his
Fred x Goldman.
mark.
his
Bernard x Holmes.
mark.

his
Thomas x Brown.
mark.
his
William x Grimes.
mark.
his
Owen x Chase.
mark.
his
Newton x Goldman.
mark.
his
Abraham x Hamerson.
mark.
his
Seymour x Roy.
mark.
his
James H. x Lane.
mark.
his
Robert x Jordan.
mark.
his
Cyrus x Jackson.
mark.
his
George x Washington.
mark.
his
Jacob x Crawford.
mark.
his
George x Coleman.
mark.
her
Mrs. x Plummer.
mark.
his
Winston x Jones.
mark.
his
Ephriam x Elam.
mark.
her
Mrs. x Scott.
mark.
his
Isom x Morrison.
mark.

R. P. Strong.

his
John x Alexander.
mark.
his
Joseph x Brown.
mark.

Charles Cook.
his
Thomas x Dabney.
mark.

William Jones.

Carter Johnson.

his
Jefferson x Lane.
mark.

W. H. Lomax.

his
Henry x Conway.
mark.

Isaac E. Clinkett.

his
John W. x Ward.
mark.
his
Benjamin x Wright.
mark.
his
Fielding x Washington.
mark.
his
Edward x Willis.
mark.
his
Nelson x Wormley.
mark.
his
John x Williams.
mark.
his
Simeon x Wright.
mark.
his
Cornelius x West.
mark.
his
Isaiah x Wilder.
mark.
his
John x Wells.
mark.
his
Stephen x Bailey.
mark.
his
Samuel x Bowman.
mark.
his
Charles x Bailey.
mark.

his
John x Burrill.
mark.

his
James x Brown.
mark.

her
Julia x Church.
mark.
his
Lewis x Davenport.
mark.

his
John T. x Burgess.
mark.

his
Charles x Courtis.
mark.

7 his
Fred. x Contee.
mark.
his
Fielding x Contee.
mark.
his
John E. x Curry.
mark.
his
Daniel x Carroll.
mark.
his
Hiram x Fleet.
mark.
his
Joseph x Gardner.
mark.
his
Oliver x Gardner.
mark.

his
Benjamin x Hines.
mark.
his
George x Ransom.
mark.
his
George x Green.
mark.
his
Ruffin x Holmes.
mark.
his
Robert x Smith.
mark.
his
Harrison x Goldman.
mark.

Jerry Armistead,
James Fisher,
Henry L. Holmes,
Henry Jones,
Maria C. Syphax,
James N. Tinson,
Byron Webb,
Dinah Nash,
} By counsel.

UNITED STATES,
Eastern District of Virginia, to wit:

I, John S. Fowler, a commissioner of the circuit court of the United States for the eastern district of Virginia, do certify that the foregoing petitioners having been by me duly sworn, upon their oaths say that they have heard read the said petition, and know the contents thereof; and that the same is true of their own knowledge except as to those matters therein stated on information and belief, and as to those matters they believe the same to be true.

Given under my hand this 26th day of June, A. D. 1877.

[SEAL.] JOHN S. FOWLER,
U. S. Commissioner.

8 I, L. L. Lewis, an attorney practising in the circuit court of the United States for the eastern district of Virginia, do certify that, as counsel for the above-named petitioners, I have examined the proceedings against them, and carefully enquired into all the matters set forth in their foregoing petition, and that I believe them to be true.

L. L. LEWIS.

(Petition endorsed:) 1327. U. S. circuit court, eastern dist. of Va. Fred'rick Kauffman et als. ad's G. W. C. Lee, in ejectment. Petition for removal from circuit court of Alexandria Co., Va., by def 'ts, with certificate, &c. Filed July 6th, 1877. M. F. Pleasants, cl'k.

Thereupon, to wit, on the ninth day of July, A. D. 1877, a writ of certiorari was awarded, which, with the return thereon, is in the words and figures following, to wit:

Certiorari.

The President of the United States of America to the judges of the circuit court of the county of Alexandria, State of Virginia, greeting:

We, for certain reasons, being desirous that our circuit court
9 of the United States for the eastern district of Virginia, in the fourth circuit, shall be certified of a certain cause commenced before you against Fred'rick Kauffman and others, defendants, by G. W. C. Lee, plaintiff, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of Alexandria, forthwith, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness M. R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the (9th) ninth day of July, in the year one thousand eight hundred and seventy-seven.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Return.

Executed this 11th day of July, 1877, by delivering to Louis E. Payne, clerk of the circuit court for the county of Alexandria, Va., a true copy of the within.

C. P. RAMSDELL,
U. S. Marshal,
By I. C. O'NEAL, *Deputy.*

10 (Endorsed:) 1327. U. S. circuit court. Fred'rick Kauffman and others ad's G. W. C. Lee. Certiorari. Filed July 11th, 1877. M. F. Pleasants, clerk.

And on another day, to wit, the 19th day of July, 1877, came the defendants by counsel and filed in the clerk's office of this court a second petition in said cause; which petition, with the endorsements thereon, is in the words and figures following, to wit:

Petition.

In the circuit court of the United States for the eastern district of Virginia.

Your petitioners, Frederick Kaufman, R. P. Strong, Tibbit Allen, Edward Austin, William H. August, Jerry Armistead, John Alexander, Julia Buckner, Charles Bailor, Joseph Brown, Stephen Bailey, Samuel Branham, Samuel Bowman, William H. Butler, Washington Bagby, Albert Brown, Charles Bailey, Randall Bates, John Burrill, James Brown, John T. Burgess, James Ball, Thomas Brown, Jerry Crutchfield, Charles Courtis, Fred Contee, Fielding Contee, Benjamin Cole, Robert Carter, George Coleman, John E. Curry, William Conway, Jacob Crawford, Daniel Carroll, Owen Chase, George Conway, Charles Cook, Julia Church, Richard Cliffins, Isaac E. Clinkitt, James Clinkitt, Henry Conway, Albert Dickerson, Thomas Dabney, Lewis Davenport, Peter Dade, Dennis Diggs, John Davis, Ephraim Elan, Paul Elms, James Fisher, Hiram Fleet, Elias Fox, Jacob Foster, Harrison

Goldman, Newton Goldman, Daniel Green, William H. Gant, Daniel Goldman, Fred Goldman, George Green, Harrison Green, Arthur Green, Benjamin Green, Joseph Gardner, Oliver Gardner, William Grimes, William Harcum, Ruffin Holmes, Bernard Holmes, Henry L. Holmes, Benjamin Hines, Conway Hart, Abraham Hamerson, Daniel Hogan, Farmer Harris, Austin Harris, William Jones, Winston Jones, H. A. Jefferson, Henry Jones, Solomon Jackson, Robert Jourdan, Fannie Jackson, Cyrus Jackson, Charles Jackson, Carter Johnson, Richard Lewis, James Lewis, James H. Lane, Jefferson Lane, William H. Lomax, Henry Lomax, Sallie Lipsicomb, Willis Lewis, Henry Morton, Joseph Morgan, Isom Morrison, Henry Mitchell, Lucinda Moran, Wesley Norris, Dinah, Nash, John Offord, Jerry Overton, Thomas Owens, John W. Pendleton, Dennis Pinn, Mrs. Plummer (widow of Elias Plummer), William Plummer, James Parks, Lawrence Parks, Nathan Pendleton, Lot Purnell, Benjamin Pollard, George Ransom, James H. Robertson, Dandridge Richardson, John Richardson, Jasper Richardson, Seymour Roy, Caroline Robinson, William A. Rowe, John Simmons, T. Elzey Slaughter, John Abraham Slaughter, Lewis Somerville, Reuben Somerville, Allen Spencer, William E. Smith, Robert Smith, Nathaniel Smith, Martha Smith, Alexander Scott, Mrs. Scott (widow of Garland Scott), Nicholas Snow, Abraham Summers, Troy Shelton, Mrs. Spriggs (widow of Nathan Spriggs), Daniel Stewart, Maria C. Syphax,
11 James Turner, John Toales, Quincey Taylor, Henry Thomas, Albert Turner, Spencer Taskon, James N. Tinson, Scipio Terry, John W. Ward, Benjamin Wright, Byron Webb, Fielding Washington, Edward Willis, James Washington, Willis J. Wormley, Nelson Wormley, Jacob Williams, John Williams, Simeon Wright, Cornelius West, John Wells, Isaiah Wilder, Jesse Watkins, Jerry Smith, and George Washington, respectfully represent:

That a suit has been commenced in the circuit court for the county of Alexandria by George W. C. Lee against your petitioners, in ejectment, to recover a certain tract of land, called and known by the name of "Arlington," in said county of Alexandria, Virginia, claimed to contain eleven hundred acres of land, more or less, which suit has not yet been determined.

Your petitioners say that they do not claim title to said land, or interest therein, except as follows, to wit:

A certain portion thereof, consisting of about two hundred acres thereof, more or less, is in charge of the War Department of the United States, and is being used as a national cemetery, for the burial of deceased soldiers and sailors of the United States, and said defendant Kauffman is a superintendent thereof, under directions of said War Department; the remaining portion of said premises is set apart as a military post, and reserve connected therewith, of the United States, and is now in charge of the defendant Strong, who is an officer
12 of the United States, and occupying the same under orders of the War Department, and in obedience to an order thereof, of which the following is a copy, to wit:

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, D. C. July 26, 1872.

The QUARTERMASTER-GENERAL, *U. S. Army:*

SIR: The Secretary of War directs that all that part of the Arlington estate outside the walls of the national cemetery be considered a mili-

tary reservation, pertaining to Fort Whipple, Va., and under the immediate charge of the commanding officer of that post.

The Secretary has approved your recommendation that those persons who have crops on the proposed sites for new buildings shall be compensated therefor from the contingencies of the Army. A board of survey has assessed the total amount at $540, which has been ordered to be paid to the parties.

Also that the copy of the survey describing the metes and bounds of the Arlington estate be filed in the Quartermaster-General's Office as record of a military reserve, and be recorded in the proper land-record office in Alexandria, Va.

Very respectfully, your obedient servant,

(S'g'd) E. D. TOWNSEND,
Adjutant-General.

13 That such of said defendants, except Strong and Kauffman, as are upon the said premises occupy the same not as tenants, but under permission of the officers in charge of said military reservation, which is in writing or printing, and is substantially as follows:

FORT WHIPPLE, , 187 .

This is to certify that is permitted to occupy acres of on the Arlington reservation until , 187 .

No rent will be charged for this occupation of the reservation to that date.

(Signed)

Officer in Charge.

That the said estate was sold by the commissioners of taxes appointed under the act of Congress of June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States and for other purposes," and acting thereunder and under acts amendatory thereof, for default of payment of direct taxes assessed under said act; at which sale the United States became the
14 purchaser thereof, and that the United States claim title and the right of possession to said premises under and by virtue of a certificate of sale made to them by said commissioners under the said act and amendments thereto, and which title your petitioners set up and claim as a defence to the said action brought against them.

Your petitioners therefore petition that this court issue a writ of certiorari to the said State court, requiring it to send to this court the record and proceedings in said cause, and for such other relief as may be proper in the premises.

By Counsel, W. WILLOUGHBY,
Att'y for Defendants.

I, W. Willoughby, an attorney of the circuit court of the United States for the eastern district of Virginia, do hereby certify that, as counsel for the petitioners, I have examined the proceedings against them, and carefully enquired into all the matters set forth in the petition, and that I believe them to be true.

W. WILLOUGHBY.

15 DISTRICT OF COLUMBIA,
County of Washington, ss:

On this 3d day of September came before me R. P. Strong, one of the petitioners above named, and made oath that the facts set forth in

said petition are true to his knowledge except as to the matters stated upon information and belief, and as to those matters he believes them to be true.

R. P. STRONG.

Subscribed and sworn before me Sept. 3d, 1877.
[SEAL.] R. J. MEIGS, *Clk*,
By R. J. MEIGS, JR., *As't*.

(Petition endorsed:) 1327. U. S. circuit court, eastern district of Va. Fred'rick Kauffman et als. ads. G. W. C. Lee, in ejectment. Petition filed with me at Norfolk 19th July, 1877, and handed to the clerk at Alexandria on 4th Sept., '77. Ro. W. Hughes, judge.

And at another day, to wit, on the 19th day of July, 1877, came the defendants, by counsel, and filed in the clerk's office of this court the record and proceedings had in the above-entitled cause in the
16 said circuit court of Alexandria County; which record and proceedings are in the words and figures following, to wit:

Record.

VIRGINIA:

In the circuit court of the county of Alexandria.

Among the records and judicial proceedings of the circuit court of the county of Alexandria are the following, to wit:

G. W. C. LEE, PLAINTIFF,
against
FREDERICK KAUFMAN, R. P. STRONG, TIBBIT Allen, Edward Austin, William H. August, Jerry Armistead, John Alexander, Julia Buckner, Charles Bailor, Joseph Brown, Stephen Bailey, Samuel Branham, Samuel Bowman, William H. Butler, Washington Bagby, Albert Brown, Charles Bailey, Randall Bates, John Burrill, James Brown, John T. Burgess, James Ball, Thomas Brown, Jerry Crutchfield, Charles Courtis, Fred Contee, Fielding Contee, Benjamin Cole, Robert Carter, George Coleman, John E. Curry, William Conway, Jacob Crawford, Daniel Carroll, Owen Chase, George Conway, Charles Cook, Julia Church, Richard Cliffins, Isaac E. Clinkitt, James Clinkitt, Henry Conway, Albert Dickerson, Thomas Dabney, Lewis Davenport, Peter Dade, Dennis Diggs, John Davis, Ephraim Elan, Paul Elms, James Fisher, Hiram Fleet, Elias Fox, Jacob Foster, Harrison Goldman, Newton Goldman, Daniel Green, William H. Gant, Daniel Goldman, Fred Goldman, George Green, Harrison Green, Arthur Green, Benjamin Green, Joseph Gardner, Oliver Gardner, William Grimes, William Harcum, Ruffin Holmes, Bernard Holmes, Henry L. Holmes,

Benjamin Hines, Conway Hart, Abraham Hamerson, Daniel Hogan, Farmer Harris, Austin Harris, William Jones, Winston Jones, H. A. Jefferson, Henry Jones, Solomon Jackson, Robert Jourdan, Fannie Jackson, Cyrus Jackson, Charles Jackson, Carter Johnson, Richard Lewis, James Lewis, James H. Lane, Jefferson Lane, William H. Lomax, Henry Lomax, Sallie Lipsicomb, Willis Lewis, Henry Morton, Joseph Morgan, Isom Morrison, Henry Mitchell, Lucinda Moran, Wesley Norris, Dinah Nash, John Offord, Jerry Overton, Thomas Owens, John W. Pendleton, Dennis Pinn, Mrs. Plummer (widow of Elias Plummer), William Plummer, James Parks, Lawrence Parks, Nathan Pendleton, Lot Purnell, Benjamin Pollard, George Ransom, James H. Robertson, Dandridge Richardson, John Richardson, Jasper Richardson, Seymour Roy, Caroline Robinson, William A. Rowe, John Simmons, T. Elzey Slaughter, John Abraham Slaughter, Lewis Somerville, Reuben Somerville, Allen Spencer, William E. Smith Robert Smith, Nathaniel Smith, Martha Smith, Alexander Scott, Mrs. Scott (widow of Garland Scott), Nicholas Snow, Abraham Summers, Troy Shelton, Mrs. Spriggs (widow of Nathan Spriggs), Daniel Stewart, Maria C. Syphax, James Turner, John Toales, Quincey Taylor, Henry Thomas, Albert Turner, Spencer
17 Tasker, James N. Tinson, Scipio Terry, John W. Ward, Benjamin Wright, Byron Webb, Fielding Washington, Edward Willis, James Washington, Willis J. Wormley, Nelson Wormley, Jacob Williams, John Williams, Simeon Wright, Cornelius West, John Wells, Isaiah Wilder, Jessee Watkins, Jerry Smith, and George Washington, defendants. } In ejectment.

Be it remembered that heretofore, to wit, on Monday, the 7th day of May, 1877, that being the first day of May rules, came the plaintiff, by his attorney, and filed in the clerk's office of said circuit court a declaration in ejectment against the defendants, with proof of the service of the notice thereof; which said declaration, with the proof of the service of the notice thereof, is in the words and figures following, to wit:

Declaration.

STATE OF VIRGINIA,
Alexandria County, to wit:

In the circuit court of said county.

G. W. C. Lee, plaintiff, complains of Frederick Kaufman, R. P. Strong, Tibbit Allen, Edward Austin, William H. August, Jerry Armi-

stead, John Alexander, Julia Buckner, Charles Bailor, Joseph Brown, Stephen Bailey, Samuel Branham, Samuel Bowman, William H.
18 Butler, Washington Bagby, Albert Brown, Charles Bailey, Randall Bates, John Burrill, James Brown, John T. Burgess, James Ball, Thomas Brown, Jerry Crutchfield Charles Courtis, Fred Contee, Fielding Contee, Benjamin Cole, Robert Carter, George Coleman, John E. Curry, William Conway, Jacob Crawford, Daniel Carroll, Owen Chase, George Conway, Charles Cook, Julia Church, Richard Cliflins, Isaac E. Clinkitt, James Clinkitt, Henry Conway, Albert Dickerson, Thomas Dabney, Lewis Davenport, Peter Dade, Dennis Diggs, John Davis, Ephraim Elan, Paul Elms, James Fisher, Hiram Fleet, Elias Fox, Jacob Foster, Harrison Goldman, Newton Goldman, Daniel Green, William H. Gant, Daniel Goldman, Fred Goldman, George Green, Harrison Green, Arthur Green, Benjamin Green, Joseph Gardner, Oliver Gardner, William Grimes, William Harcum, Ruffin Holmes, Bernard Holmes, Henry L. Holmes, Benjamin Hines, Conway Hart, Abraham Hamerson, Daniel Hogan, Farmer Harris, Austin Harris, William Jones, Winston Jones, H. A. Jefferson, Henry Jones, Solomon Jackson, Robert Jourdan, Fannie Jackson, Cyrus Jackson, Charles Jackson, Carter Johnson, Richard Lewis, James Lewis, James H. Lane, Jefferson Lane, William H. Lomax, Henry Lomax, Sallie Lipsicomb, Willis Lewis, Henry Morton, Joseph Morgan, Isom Morrison, Henry Mitchell, Lucinda Moran, Wesley Norris, Dinah Nash, John Offord, Jerry Overton, Thomas Owens, John W. Pendleton, Dennis Pinn, Mrs. Plummer (widow of Elias Plummer), William Plummer, James Parks, Lawrence Parks, Nathan Pendleton, Lot Purnell, Benjamin Pollard, George Ransom, James H. Robertson, Dandridge Richardson, John Richardson, Jasper Richardson, Seymour Roy, Caroline Robinson, William A. Rowe, John Simmons, T. Elzey Slaughter, John Abraham Slaughter, Lewis Somerville, Reuben Somerville, Allen Spencer, William E. Smith, Robert Smith, Nathaniel Smith, Martha Smith, Alexander Scott, Mrs. Scott (widow of Garland Scott), Nicholas Snow, Abraham Summers, Troy Shelton, Mrs. Spriggs (widow of Nathan Spriggs), Daniel Stewart, Maria C. Syphax, James Turner, John Toales, Quincey Taylor, Henry Thomas, Albert Turner, Spencer Tasker, James N. Tinson, Scipio Terry, John W. Ward, Benjamin Wright, Byron Webb, Fielding Washington, Edward Willis, James Washington, Willis J. Wormley, Nelson Wormley, Jacob Williams, John Williams, Simeon Wright, Cornelius West, John Wells, Isaiah Wilder, Jesse Watkins, Jerry Smith, and George Washington, defendants, for this—

For that heretofore, to wit, on the 5th day of January, 1875,
19 the said plaintiff was possessed of a certain tract of land, in the county of Alexandria and State of Virginia, called Arlington, and bounded and described as follows, viz: Beginning at a maple standing on the west side of a small branch, and near where it runs into the Potomac River, at or near where the original corner red oak stood, the beginning of a tract of land granted Robert Howsen for six thousand acres by patent dated the 21st of October, 1669; thence down the meanders of the Potomac River, including an inlet of nine acres covered with water, and six acres in Gravely Creek, to a maple standing over a large spring issuing out of a high bank or hill, corner of the division between Gerrard Alexander and the heirs of Philip Alexander; thence with the line of division between said parties S. 72″ 45′ W. 448 poles to a corner where the said division line intersects the west line of said Howsen's patent; thence northwardly with the west line of said Howsen's patent to a point where the same is broken in upon by

the south line of Chapman's interference, and following the out-
20 lines of said interference eastwardly and northwardly to the point where the same meet the west line of said patent, and thence northwardly with said west line of said patent to a pile of stones and several saplings, blazed, in the said line on the south side of a stony hill; thence N. 84° 30′ E. 348 poles to the point of beginning, containing eleven hundred acres of land, more or less, being the same property which formerly belonged to George Washington Parke Custis, deceased, which said premises the plaintiff claims in fee; and the plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the 6th day of January, 1875, entered into the said premises and ejected the said plaintiff therefrom, and unlawfully withhold from the plaintiff the possession thereof, to the damage of the plaintiff $50,000.

And the said plaintiff further avers that heretofore, to wit, on the 5th day of January, 1875, he, the said plaintiff, was possessed of a certain other tract of land called and known by the name of Arlington,
21 situate in the county of Alexandria and State of Virginia, containing eleven hundred acres, more or less, bounded on the east by the Potomac River, on the south by the lands of Horace S. Johnston, John R. Johnston, Guy Henry, and W. Perkins; on the west by the lands of Lot W. Crocker, William Elliot, John Causine, Septimus Brown, B. W. Hunter, Fendall Alexander, and H. R. F. Vinson; and on the north by the lands of Randolph Birch and Henry S. McComb, said tract called Arlington being formerly the property of George Washington Parke Custis, deceased, and of which he died seized, which said premises the said plaintiff claims in fee. And the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the 6th day of January, 1875, entered into said premises and ejected the said plaintiff therefrom, and unlawfully withhold from the said plaintiff the possession thereof, to the damage of the plaintiff of $50,000.

And the said plaintiff further complains of the said defendants, for that whereas the said plaintiff, on the 5th day of January, in the
22 year of our Lord one thousand eight hundred and seventy-five, was possessed of a certain tract of land situate in the county of Alexandria, in the State of Virginia, to wit, Arlington, on the Georgetown road, northwest from the court-house nine miles, and bounded as follows: On the north by the land of William H. Ross; east by the Potomac River; south by the lands of James Roach, John R. Johnston, and Guy Henry; west by the lands of William Elliot, Columbus Alexander, and John Tucker, containing eleven hundred acres, be the same more or less, which said premises the said plaintiff claims in fee; and he, the said plaintiff, being so possessed thereof, the said defendants afterwards, to wit, on the 6th day of January, 1875, entered into the said premises and ejected the said plaintiff therefrom, and unjustly withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff of $50,000; and therefore he brings his suit.

WILLIAM J. ROBERTSON,
FRANCIS L. SMITH, *P. Q.*

Notice.

23 To Frederick Kauffman, R. P. Strong, Tibbit Allen, Edward Austin, William H. Augrist, Jerry Armistead, John Alexander, Julia Buckner, Charles Bailor, Joseph Brown, Stephen Bailey, Samuel Branham, Samuel Bowman, William H. Butler, Washington

Bagby, Albert Brown, Charles Bailey, Randall Bates, John Burrill, James Brown, John T. Burgess, James Ball, Thomas Brown, Jerry Crutchfield, Charles Courtis, Fred Contee, Fielding Contee, Benjamin Cole, Robert Carter, George Coleman, John E. Currey, William Conway, Jacob Crawford, Daniel Carroll, Owen Chase, George Conway, Charles Cook, Julia Church, Richard Cliflins, Isaac E. Clinkitt, James Clinkett, Henry Conway, Albert Dickerson, Thomas Dabney, Lewis Davenport, Peter Dade, Dennis Diggs, John Davis, Ephraim Elan, Paul Elms, James Fisher, Hiram Fleet, Elias Fox, Jacob Foster, Harrison Golmadn, Newton Goldman, Daniel Green, William H. Gant, Daniel Goldman, Fred Goldman, George Green, Harrison Green, Arthur Green, Benjamin Green, Joseph Gardner, Oliver Gardner, William Gaines, William Harcum, Ruffin Holmes, Bernard Holmes, Henry L. Holmes, Benjamin Hines, Conway Hart, Abraham Hamerson, Daniel Hogan, Farmer Harris, Austin Harris, William Jones, Winston Jones,
24 H. A. Jefferson, Henry Jones, Solomon Jackson, Robert Jourdan, Fannie Jackson, Cyrus Jackson, Charles Jackson, Carter Johnston, Richard Lewis, James Lewis, James H. Lane, Jefferson Lane, William H. Lomax, Henry Lomax, Sallie Lipsicomb, Willis Lewis, Henry Morton, Joseph Morgan, Isom Morrison, Henry Mitchell, Lucinda Moran, Wesley Norris, Dinah Nash, John Offord, Jerry Overton, Thomas Owens, John W. Pendleton, Dennis Pinn, Mrs. Plummer (widow of Elias Plummer), William Plummer, James Parks, Lawrence Parks, Nathan Pendleton, Lott Purnell, Benjamin Pollard, George Ransom, James H. Robertson, Dandridge Richardson, John Richardson, Jasper Richardson, Seymour Roy, Caroline Robinson, William A. Rowe, John Simmons, T. Elzey Slaughter, John Abraham Slaughter, Lewis Somerville, Reuben Somerville, Allen Spencer, William E. Smith, Robert Smith, Nathaniel Smith, Martha Smith, Alexander Scott, Mrs. S ott (widow of Garland Scott), Nicholas Snow, Abraham Sumums, Troy Shelton, Mrs. Spriggs (widow of Nathan Spriggs), Daniel Stewart, Maria C. Syphax, James Turner, John Toales, Quincey Taylor, Henry Thomas, Albert Turner, Spencer Tasker, James N.
25 Tinson, Scipio Terry, John W. Ward, Benjamin Wright, Byron Webb, Fielding Washington, Edward Willis, James Washington, Willis J. Wormley, Nelson Wormley, Jacob Williams, John Williams, Simeon Wright, Cornelius West, John Wells, Isaiah Wilder, Jesse Watkins, Jerry Smith and George Washington.

Please to take notice, that on the first Monday of May, 1877, that being the first day of the May rules, 1877, of said court, I shall file in the clerk's office of the circuit court of Alexandria County, Virginia, a declaration in ejectment, of which the foregoing is a copy.

G. W. C. LEE,
By WILLIAM J. ROBERTSON,
FRANCIS L. SMITH,
His Attorneys.

Statement of mesne profits filed with the foregoing declaration.

Amount of rent at the yearly value of $10,000, from the 6th day of January, 1875, until verdict, which the said plaintiff means to demand for the use of the land in the declaration mentioned,

Statement of damages which the plaintiff means to demand for
26 *injuries done to the property in the foregoing declaration mentioned.*

For destruction and waste of the buildings and other property, $50,000.

STATE OF VIRGINIA,
Alexandria City, to wit:

This day Jefferson Tracey personally appeared before me, the undersigned, a notary public in and for the city of Alexandria, in the State aforesaid, and made oath in due form of law that on the eleventh day of April, 1877, he delivered a true copy of the foregoing declaration in ejectment, notice and account, and explained the contents thereof to Fredrick Kauffman, R. P. Strong, Joseph Brown, John Burrill, Arthur Green, Joseph Gardiner, Oliver Gardiner, Henry L. Holmes, William Jones, Fannie Jackson, Cyrus Jackson, Sallie Lipscombe, Benjamin Pollard, William A. Rowe, T. Elzey Slaughter, James Turner, and Spencer Tasker; that on the 12th day of April, 1877, he delivered a true copy of said declaration, notice, and account to John Alexander, Stephen Bailey, Charles Bailey, James Ball, Charles Courtis, George Coleman, John E. Curry, Richard Cifflins, Thomas Dabney, Jacob Foster, William H. Gant, Ber-
27 nard Holmes, Daniel Hogan, Farmer Harris, Winston Jones, H. A. Jefferson, Carter Johnston, James Lewis, James H. Lane, William H. Lomax, Henry Lomax, Henry Mitchell, Dinah Nash, Thomas Owens, John W. Pendleton, Mrs. Plummer (widow of Elias Plummer, deceased), William Plummer, Seymour Roy, Lewis Somerville, Reuben Reuben Somerville, Abraham Summers, Troy Shelton, Quincy Taylor, John Toales, John W. Ward, Benjamin Wright, Edward Willis, George Washington, J. Willis Wormley, Nelson Wormley, John Wells, and Jesse Watkins; that on the 13th day of April, 1877, he delivered a true copy of said declaration, notice, and account to Tibbit Allen, Edward Austin, William H. August, Jerry Armistead, Julia Buckner, Washington Bagby, John T. Burgess, Robert Carter, Julia Church, James Clinkett, Dennis Diggs, Paul Elms, Elias Fox, Daniel Goldman, Charles Jackson, Isom Morrison, Lot Purnell, Nathaniel Smith, Nicholas Snow, and Maria C. Syphax, at their usual places of abode; that on the 11th day of April, 1877, he delivered a true copy of the foregoing declaration in ejectment, notice, and account therewith, and gave information of its purport, to the wife of Owen Chase,
28 and the wife of Lewis Davenport, said wives being over the age of sixteen years, at the usual places of abode of the said Owen Chase and Lewis Davenport, and the said Owen Chase and Lewis Davenport not being found at their usual places of abode; that on the 12th day of April, 1877, he delivered a true copy of the said declaration, notice, and account, and gave information of its purport, to the wife of Charles Bailor, to the wife of James Brown, to the wife of Jerry Crutchfield, to the wife of Fredrick Contee, to the wife of Fielding Contee, to the wife of William Conway, to the wife of Jacob Crawford, to the wife of Albert Dickerson, to the wife of Hiram Fleet, to the wife of Daniel Green, to the wife of Harrison Green, to the wife of William Harcum, to the wife of Benjamin Hines, to the wife Willis Lewis, to the wife of James Parks, to the wife of Lawrence Parks, to the wife of John Simmons, to the wife of Henry Thomas, to the wife of Albert Turner, to the wife of Fielding Washington, to the wife of John Williams, and to the wife of Isaiah Wilder, at the usual places of abode of the said Charles Bailor, James Brown, Jerry Crutchfield, Fredrick Contee,

Fielding Contee, William Conway, Jacob Crawford, Albert Dick-
29 erson, Hiram Fleet, Daniel Green, Harrison Green, William Harcum, Benjamin Hines, Willis Lewis, James Parks, Lawrence Parks, John Simons, Henry Thomas, Albert Turner, Fielding Washington, John Williams, and Isaiah Wilder, all of said wives being over the age of sixteen years, the said Charles Bailor, James Brown, Jerry Crutchfield, Fredrick Contee, Fielding Contee, William Conway, Jacob Crawford, Albert Dickerson, Hiram Fleet, Daniel Green, Harrison Green, William Harcum, Benjamin Hines, Willis Lewis, James Parks, Lawrence Parks, John Simmons, Henry Thomas, Albert Turner, Fielding Washington, John Williams, and Isaiah Wilder not being found at their usual places of abode; that he delivered a true copy of the said declaration, notice, and account, and gave information of the purport thereof on the 13th day of April, 1877, to the wife of Samuel Bowman, to the wife of William H. Butler, to the wife of Albert Brown, to the wife of Randall Bates, to the wife of Benjamin Cole, to the wife of Daniel Carroll, to the wife of George Conway, to the wife of Peter Dade, to the wife of Ephriam Elan, to the wife of Harrison Goldman, to the wife of Ruffin Holmes, to the wife of Conway Hart, to the wife of Henry
30 Jones, to the wife of Robert Jourdan, to the wife of Richard Lewis, to the wife of Jefferson Lane, to the wife of Henry Morton, to the wife of Joseph Morgan, to the wife of Westey Norris, to the wife of John Offord, to the wife of Jerry Overton, to the wife of Dennis Pinn, to the wife of George Ransom, to the wife of John Richardson, to the wife of Jasper Richardson, to the wife of Allen Spencer, to the wife of William E. Smith, to the wife of Alexander Scott, to the wife of James Washington, to the wife of Jacob Williams, to the wife of Simeon Wright, and to the wife of Cornelius West, all of said wives being over the age of sixteen years, at the usual places of abode of the said Samuel Bowman, William H. Butler, Albert Brown, Randall Bates, Benjamin Cole, Daniel Carroll, George Conway, Peter Dade, Ephriam Elan, Harrison Goldman, Ruffin Holmes, Conway Hart, Henry Jones, Robert Jourdan, Richard Lewis, Jefferson Lane, Henry Morton, Joseph Morgan, Wesley Norris, John Offord, Jerry Overton, Dennis Pinn, George Ransom, John Richardson, Jasper Richardson, Allen Spencer, William E. Smith, Alexander Scott, James Washington, Jacob Williams, Simeon Wright, and Cornelius West, the said Samuel
31 Bowman, William H. Butler, Albert Brown, Randall Bates, Benjamin Cole, Daniel Carroll, George Conway, Peter Dade, Ephriam Elan, Harrison Goldman, Ruffin Holmes, Conway Hart, Henry Jones, Robert Jourdan, Richard Lewis, Jefferson Lane, Henry Morton, Joseph Morgan, Wesley Norris, John Offord, Jerry Overton, Dennis Pinn, George Ransom, John Richardson, Jasper Richardson, Allen Spencer, William E. Smith, Alexander Scott, James Washington, Jacob Williams, Simeon Wright, and Cornelius West not being found at their usual places of abode; that on the 25th day of April, 1877, he delivered a true copy of the foregoing declaration in ejectment, notice and account, and gave information of the purport thereof to the wife of Benjamin Green, over the age of sixteen years, at the usual place of abode of the said Benjamin Green, the said Benjamin Green not being found at his usual place of abode. That on the 11th day of April, 1877, he delivered a true copy of the foregoing declaration in ejectment, notice and account, and gave information of the purport thereof to H. L. Holmes, a member of the family of James N. Tinson, over the age of sixteen years, at the usual place of abode of the said James
32 N. Tinson, and to H. L. Holmes, above the age of sixteen years, a

member of the family of Scipio Terry, at the usual place of abode of the said Scipio Terry, the said James N. Tinson and Scipio Terry not being found at their usual place of abode. That on the 12th day of April, 1877, he delivered a true copy of the foregoing declaration in ejectment, notice and account, and gave information of the purport thereof to Rosalie S. Branham, a sister and member of the family of Samuel Branham, above the age of sixteen years, at the usual place of abode of the said Samuel Branham, to Lewis Somerville, a son-in-law, above the age of sixteen years, of James Fisher, and a member of his family, at the usual place of abode of the said James Fisher; to Caroline Harris, above the age of sixteen years, a daughter and member of the family of Aus in Harris, at the usual place of abode of the said Austin Harris; to Maggie Parks, over the age of sixteen years, a sister and member of the family of Martha Smith, at the usual place of abode of the said Martha Smith; the said Samuel Branham, James Fisher, Austin Harris, and Martha Smith, not being found at
33 their usual places of abode. That on the 13th day of April, 1877, he delivered a true copy of the foregoing declaration in ejectment, notice and account, and gave information of the purport thereof to Charles Jackson, over the age of sixteen years, and a member of the family of Charles Cook, at the usual place of abode of the said Charles Cook; to James Clinkett, over the age of sixteen years, the father and a member of the family of Isaac E. Clinket, at the usual place of abode of the said Isaac E. Clinkett; to Edward Austin, over the age of sixteen years, the father-in-law and a member of the family of John Davis, at the usual place of abode of the said John Davis; to Mrs. Overton, over the age of sixteen years, the mother-in-law and a member of the family of Fredrick Goldman, at the usual place of abode of the said Fredrick Goldman; to Julia Crutchfield, over the age of sixteen years, the mother and a member of the family of George Green, at the usual place of abode of the said George Green; to Fannie Grimes, over the age of sixteen years, the mother and a member of the family of William Grimes, at the usual place of abode of the said William Grimes; to Catharine Mines, over the age of sixteen years, the
34 cousin and a member of the family of Solomon Jackson, at the usual place of abode of the said Solomon Jackson; to Eliza Pendleton, above the age of sixteen years, the daughter and a member of the family of Nathan Pendleton, at the usual place of abode of the said Nathan Pendleton; to Edith Washington, above the age of sixteen years, a sister and a member of the family of Dandridge Richardson, at the usual place of abode of the said Dandridge Richardson; to Sarah Catharine Green, above the age of sixteen years, a daughter and a member of the family of Caroline Robinson, at the usual place of abode of the said Caroline Robinson; to Nathaniel Smith, above the age of sixteen years, a brother and a member of the family of Robert Smith, at the usual place of abode of the said Robert Smith; to Nathaniel Smith, above the age of sixteen years, a brother and a member of the family of Jerry Smith, at the usual place of abode of the said Jerry Smith; to Helen Foster, over the age of sixteen years, the mother and a member of the family of Mrs. Scott (widow of
35 Garland Scott, deceased), at the usual place of abode of the said Mrs. Scott; to Mrs. Carroll, wife of Daniel Carroll, above the age of sixteen years, the sister and a member of the family of Mrs. Spriggs (widow of Nathan Spriggs, deceased), at the usual place of abode of the said Mrs. Spriggs; to Tibbit Allen, over the age of sixteen

years, a member of the family of Daniel Stewart, at the usual place of abode of the said Daniel Stewart; to T. E. Slaughter, over the age of sixteen years, a brother and a member of the family of John A. Slaughter, at the usual place of abode of the said John A. Slaughter; the said Charles Cook, Isaac E. Clinkett, John Davis, Frederick Goldman, George Green, William Grimes, Solomon Jackson, Nathan Pendleton, Dandridge Richardson, Caroline Robinson, Robert Smith, Jerry Smith, Mrs. Scott, Mrs. Spriggs, Daniel Stewart and John A. Slaughter not being found at their usual places of abode. That on the 13th day of April, 1877, he left a copy of the foregoing declaration in ejectment, notice, and account posted at the front door of the usual place of abode of Thomas Brown, of Abraham Hamerson, of Lucinda Moran, and of
James H. Robertson, neither of the said Thomas Brown,
36 Abraham Hammerson, Lucinda Moran, and James H. Robertson, nor their wives, nor any person above the age of sixteen years of age, having been found by him at their usual places of abode; that the said Henry Conway, Newton Goldman, and Byron Webb were not found, having removed from their former places of abode.

JEFFERSON TACEY.

Witness the signature of the said Jefferson Tacey, and my own signature hereto, this 28th day of April, 1877.

K. KEMPER,
Notary Public.

And at another day, to wit, on Monday, the 7th day of May, 1877, came the plaintiff, by his attorney, and sued out of the clerk's office of said circuit court a rule against the defendants to plead to said declaration in ejectment; which rule, with the return thereon, is in the words and figures following, to wit:

Rule.

37 The Commonwealth of Virginia to the sheriff of Alexander County, greeting:

We command you to summon Fredrick Kauffman, R. P. Strong, Tibbit Allen, Edward Austin, William H. August, Jerry Armistead, John Alexander, Julia Buckner, Charles Bailor, Joseph Brown, Stephen Bailey, Samuel Branham, Samuel Bowman, William H. Butler, Washington Bagly, Albert Brown, Charles Bailey, Randall Bates, John Burrill, James Brown, John T. Burgess, James Ball, Thomas Brown, Jerry Crutchfield, Charles Courtis, Fred. Contee, Fielding Contee, Benjamin Cole, Robert Carter, George Coleman, John E. Currey, William Conway, Jacob Crawford, Daniel Carroll, Owen Chase, George Conway, Charles Cook, Julia Church, Richard Cliffins, Isaac E. Clinkitt, James Clinkitt, Henry Conway, Albert Dickerson, Thomas Dabney, Lewis Davenport, Peter Dade, Dennis Diggs, John Davis, Ephriam Elan, Paul Elms, James Fisher, Hiram Fleet, Elias Fox, Jacob Foster, Harrison Goldman, Newton Goldman, Daniel Green, William H. Gant, Daniel Goldman, Fred. Goldman, George Green, Harrison Green, Arthur Green, Benjamin Green, Joseph Gardiner, Oliver
Gardiner, William Gaines, William Harcum, Ruffin Holmes, Ber-
38 nard Holmes, Henry L. Holmes, Benjamin Hines, Conway Hart, Abraham Hamerson, Daniel Hogan, Turner Harris, Austin Harris, William Jones, Winston Jones, H. A. Jefferson, Henry Jones, Solomon Jackson, Robert Jourdan, Fannie Jackson, Cyrus Jackson, Charles

Jackson, Carter Johnston, Richard Lewis, James Lewis, James H. Lane, Jefferson Lane, William H. Lomax, Henry Lomax, Sallie Lipsicomb, Willis Lewis, Henry Morton, Joseph Morgan, Isom Morrison, Henry Mitchell, Lucinda Moran, Wesley Norris, John Offord, Jerry Overton, Thomas Owens, John W. Pendleton, Dennis Pinn, Mrs. Plummer (widow of Elias Plummer), William Plummer, James Parks, Lawrence Parks, Nathan Pendleton, Lott Purnell, Benjamin Pollard, George Ransom, James H. Robertson, Dandridge Richardson, John Richardson, Jasper Richardson, Seymour Roy, Caroline Robinson, William A. Rowe, John Summers, T. Elzey Slaughter, John Abraham Slaughter, Lewis Somerville, Reuben Somerville, Allen Spencer, William E. Smith, Robert Smith, Nathaniel Smith, Martha Smith, Alexander Scott, Mrs. Scott (widow of Garland Scott), Nicholas Snow, Abraham Summurs, Troy Shelton,
39 Mrs. Spriggs (widow of Nathan Spriggs), Daniel Stewart, Maria C. Syphax, James Turner, John Toales, Quincey Taylor, Henry Thomas, Albert Turner, Spencer Tasker, James N. Tinson, Scipio Terry, John W. Ward, Benjamin Wright, Byron Webb, Fielding Washington, Edward Willis, James Washington, Willis J. Wormley, Nelson Wormley, Jacob Williams, John Williams, Simeon Wright, Cornelius West, John Wells, Isaiah Wilder, Jesse Watkins, Jerry Smith, George Washington, and Dinah Nash, if they be found within your bailiwick, to appear at the clerk's office of our circuit court for our said county of Alexandria at the rules to be holden for said court on the first Monday in June, 1877, and plead to a declaration in ejectment this day filed in said office, with proof of the service thereof, by G. W. C. Lee, and have then there this writ.

Witness Louis E. Payne, clerk of our said circuit court, at the courthouse of said county, the 7th day of May, 1877, and in the 101st year of the Commonwealth.

LOUIS E. PAYNE, *Clerk.*

Executed the within rule upon Julia Buckner, James Brown,
40 John T. Burgess, James Ball, Robert Carter, George Coleman, John E. Currey, Richard Cifflins, Ephriam Elan, Paul Elms, Arthur Green, Oliver Gardner, Bernard Holmes, Benjamin Hines, Conway Hart, Solomon Jackson, Henry Morton, Isom Morrison, Henry Mitchell, Dinah Nash, Dennis Pinn, Mrs. Maria C. Syphax, Henry Thomas, Nelson Wormley, R. P. Strong, and Frederick Kauffman by delivering a true copy of said rule to each one of them, respectively, in person, at their usual places of abode, on the ninth day of May, 1877, and upon Tibbit Allen, Edward Austin, John Alexander, Charles Bailor, Joseph Brown, Samuel Branham, Washington Bagby, Thomas Brown, Jerry Crutchfield, Charles Courtis, Fred. Contee, Fielding Contee, Benjamin Cole, Jacob Crawford, George Conway, Charles Cook, Julia Church, James Clinkitt, Henry Conway, Thomas Dabney, Lewis Davenport, Peter Dade, Pennis Diggs, John Davis, James Fisher, Hiram Fleet, Jacob Foster, Harrison Goldman, Newton Goldman, Fred. Goldman, George Green, William Grimes, Ruffin Holmes, Daniel Hogan, Farmer Harris, William Jones, Winston Jones, Robert Jourdan, Fannie Jackson, Carter Johnston, Richard Lewis, James Lewis, Jefferson Lane,
41 William H. Lomax, Lucinda Moran, Wesley Norris, Jerry Overton, Mrs. Plummer (widow of Elias Plummer), William Plummer, James Parks, Lawrence Parks, Nathan Pendleton, Lott Purnell, Benjamin Pollard, James H. Robertson, Dandridge Richardson, John Richardson, Caroline Robinson, John Simmons, T. Elzey Slaughter, John Abraham Slaughter, Lewis Somerville, Jerry Smith, Reuben Som-

erville, Allen Spencer, William E. Smith, Robert Smith, Alexander Scott, Mrs. Scott (widow of Garland Scott,) Abraham Summers, Troy Shelton, Daniel Stewart, James N. Tinson, Scipio Terry, Benjamin Wright, Fielding Washington, Edward Willis, James Washington, Simeon Wright, and John Wells, by delivering a true copy of said rule to each of them respectively, in person, at their usual places of abode, on the eleventh day of May, 1877; and upon John Offord, by delivering him a true copy of said rule, in person, on the 9th day of May, A. D. 1877; and upon Henry L. Holmes, John W. Pendleton, and William A. Rowe, by delivering a true copy of said rule to each of them respectively, in person, on the eleventh day of May, 1877; and upon Will-

42 iam H. August, William H. Butler, John Burrill, William Conway, Daniel Carroll, Joseph Gardner, Henry Jones, James H. Lane, Nicholas Snow, Albert Turner, John Williams, and Cornelius West, by delivering to Hannah August, wife of William H. August; Ann Butler, wife of William H. Butler; Amanda, wife of John Burrill; Nancy, wife of William Conway; Martha, wife of Daniel Carroll; Elmira, wife of Joseph Gardner; Chloe, wife of Henry Jones; Mary, wife of James H. Lane; Annie, wife of Nicholas Snow; Jane, wife of Albert Turner; Margaret, wife of John Williams; Mary Jane, wife of Cornelius West, true copies of said rule, and giving information of its purport to each of them, respectively, in person, at their usual places of abode, on the ninth day of May, 1877, each of said wives being over the age of sixteen years, the said William H. August, William H. Butler, John Burrill, William Conway, Daniel Carroll, Joseph Gardner, Henry Jones, James H. Lane, Nicholas Snow, Albert Turner, John Williams, and Cornelius West, not being found at their usual places of abode; and upon Stephen Bailey, Samuel Bowman, Albert Brown, Randall

43 Bates, Charles Bailey, Owen Chase, Albert Dickerson, Elias Fox, William H. Gant, Harrison Green, Benjamin Green, William Harcum, H. A. Jefferson, Cyrus Jackson, Charles Jackson, Willis Lewis, Thomas Owens, George Ransom, Jasper Richardson, Seymour Roy, James Turner, Spencer Tasker, John W. Ward, Jacob Williams, and Isaiah Wilder, by delivering to Eliza, wife of Stephen Bailey; Ann, the wife of Samuel Bowman; Betsy, wife of Albert Brown; Fannie, wife of Randall Bates; Ann, wife of Charles Bailey; Ellen, wife of Owen Chase; Julia, wife of Albert Dickerson; Matilda, wife of Elias Fox; Matilda, wife of William H. Gant; Fannie, wife of Harrison Green; Rosa, wife of Benjamin Green; Harriet Ann, wife of William Harcum; Lucy, wife of Henry A. Jefferson; Eda, wife of Cyrus Jackson; Polly, wife of Charles Jackson; Nancy, wife of Willis Lewis; Hannah, wife of Thomas Owens; Action, wife of George Ransom; Ann Rose, wife of Jasper Richardson; Amanda, wife of Seymour Roy; Patsey, wife of James Turner; Mary Jane, wife of Spencer Tasker; Elizabeth, wife of John W. Ward; Astor, wife of Jacob Williams, and Martha, wife of Isaiah Wilder, true copies of said rule, and giving information of its purport to each of them, respectively, in person, at their

44 usual place of abode, on the eleventh day of May, 1877, each of said wives being over the age of sixteen years, the said Stephen Bailey, Samuel Bowman, Albert Brown, Randall Bates, Charles Bailey, Owen Chase, Albert Dickerson, Elias Fox, William H. Gant, Harrison Green, Benjamin Green, William Harcum, H. A. Jefferson, Cyrus Jackson, Charles Jackson, Willis Lewis, Thomas Owens, George Ransom, Jasper Richardson, Seymour Roy, James Turner, Spencer Tasker, John W. Ward, Jacob Williams, and Isaiah Wilder not being found at their usual places of abode; and upon Jerry Armistead, Abraham Hammer-

son and Byron Webb, by delivering a true copy of said rule to each of them, respectively, in person, at their usual places of abode, on the 14th day of May, 1877; and upon Daniel Green, by delivering a true copy of said rule, and giving information of its purport to Caroline Robinson, his mother-in-law, on the 11th day of May, 1877, at his usual place of abode, she being a member of his family, and over the age of sixteen years, neither the said Daniel Green or his wife being found at their usual place of abode; and upon Daniel
45 Goldman, by leaving a true copy of said rule posted at the front door of the usual place of abode of the said Daniel Goldman on the 14th day of May, 1877, neither the said Daniel Goldman, nor his wife, nor any person above the age of sixteen years, having been found at the usual place of abode of said Daniel Goldman; and upon Isaac E. Clinkett, by delivering to him in person a true copy of said rule at his usual place of abode on the 15th day of May, 1877; upon Jesse Watkins, by delivering to Mary Watkins, wife of Jesse Watkins, a true copy of said rule and giving information of its purport to her in person at their usual place of abode, on the 14th day of May, 1877, she being over the age of sixteen, the said Jesse Watkins not being found at his usual place of abode; and upon Sallie Lipsicombe, by delivering a true copy of said rule, and giving information of its purport to Daniel Lipsicombe, her son, on the ninth day of May, 1877, at her usual place of abode, he being a member of her family, and over the age of sixteen years, the said Sallie Lipsicombe not being found at her usual place of abode; and upon Mrs. Spriggs (widow of Na-
46 than Spriggs), by delivering to Caroline Contee, her sister, a true copy of said rule, and giving information of its purport to said Caroline Contee, her sister, on the 9th day of May, 1877, at her usual place of abode, she being a member of her family and over the age of sixteen years, the said Mrs. Spriggs (widow of Nathan Spriggs), not being found at her usual place of abode; upon George Washington, by delivering a true copy of said rule, and giving information of its purport to Anna Talbot, his stepdaughter, on the 9th day of May, 1877, at his usual place of abode, she being a member of his family, and over the age of sixteen years, the said George Washington not being found at his usual place of abode; upon Austin Harris, by delivering a true copy of said rule, and giving information of its purport to Carrie Harris, his daughter, on the 11th day of May, 1877, at his usual place of abode, she being a member of his family, and over the age of sixteen years, the said Austin Harris not being found at his usual place of abode; upon Henry Lomax, by delivering a true copy of said rule, and giving information of its purport to Ester Lo-
47 max, his daughter, on the 11th day of May, 1877, at his usual place of abode, she being a member of his family and over the age of sixteen years, the said Henry Lomax not being found at his usual place of abode; upon Joseph Morgan, by delivering a true copy of said rule, and giving information of its purport to Jane Morgan, his sister, on the 11th day of May, 1877, at his usual place of abode, she being a member of his family, and over the age of sixteen years, the said Joseph Morgan not being found at his usual place of abode; upon Nathaniel Smith, by delivering a true copy of said rule, and giving information of its purport to Nancy Smith, his sister, on the 11th day of May, 1877, at his usual place of abode, she being a member of his family, and over the age of sixteen years, the said Nathaniel Smith not being found at his usual place of abode; upon Martha Smith, by delivering a true copy of said rule, and giving information of its purport to

Margaret Parks, her sister, on the 11th day of May, 1877, at her usual place of abode, she being a member of her family, and over the age of sixteen years, the said Martha Smith not being found at
48 her usual place of abode; upon John Toales, by delivering a true copy of said rule, and giving information of its purport to Isabella Barbour, his stepdaughter, on the 11th day of May, 1877, at his usual place of abode, she being a member of his family, and over the age of sixteen years, the said John Toales not being found at his usual place of abode; upon Quincey Taylor, by delivering a true copy of said rule, and giving information of its purport to Margaret Taylor, his mother, on the 11th day of May, 1877, at his usual place of abode, she being a member of his family, and over the age of sixteen years, the said Quincey Taylor not being found at his usual place of abode; upon Willis J. Wormley, by delivering a true copy of said rule, and giving information of its purport to Nelson Wormley, his father, on the 11th day of May, 1877, at his usual place of abode, he being a member of his family, and over the age of sixteen years, the said Willis J. Wormley, not being found at his usual place of abode.

W. C. WIBERT,
Sheriff Alex. Co., Va.

49 And at another day, to wit, at rules held in the clerk's office of said circuit court on the 6th day of June, 1877, came the defendants, by their attorney, and entered a demurrer to the plaintiff's declaration and the plea of the general issue that the defendants are not guilty of unlawfully withholding the premises claimed by the plaintiff in his declaration.

And this cause was continued.

VIRGINIA,
County of Alexandria, ss:

I, Louis E. Payne, clerk of the circuit court of Alexandria County, in the State of Virginia, do certify that the foregoing is a true transcript of the record in the suit instituted in said court in the name of G. W. C. Lee vs. Fredrick Kauffman and others, in ejectment.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the court-house of said county, on this the 14th day of *of* July, 1877, and in the 102 year of the Commonwealth.

[SEAL.] LOUIS E. PAYNE, *Clerk.*

50 In the circuit court of Alexandria County.

G. W. C. LEE, PLAINTIFF,
against
FREDRICK KAUFFMAN ET ALS., DEFENDANTS. } In ejectment.

COSTS.

	Pl'f.	Def't.
Tax	$50 00	
Att'y	5 00	
Clerk	19 61	1 26
Sh'ff	82 50	
Serving notices	82 50	
Record		15 75
Plat, &c		89 00
	$239 61	$106 00

Teste:

LOUIS E. PAYNE, *Clerk.*

51 (Endorsed:) G. W. C. Lee vs. Fredrick Kauffman et als. In ejectment. Record. Filed July 19th, 1877. M. F. Pleasants, clerk. Def't, $106.00.

And at another day, to wit, the 16th day of July, 1877, came the Attorney-General of the United States, and filed in the clerk's office of this court a suggestion and motion to dismiss proceedings; which suggestion and motion to dismiss are in the words and figures following, to wit:

Suggestion & motion.

In the circuit court of the United States for the eastern district of Virginia.

GEORGE W. C. LEE
vs.
FREDRICK KAUFFMAN, R. P. STRONG, & others. } In ejectment.

And now comes the Attorney-General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years and now is held occupied and possessed by the United States, through its officers and
52 agents, charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the "Arlington Cemetery," and for the uses and purposes set forth in the certificate of sale, a copy of which as stated and prepared by the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith, under claim of title as appears by the said certificate of sale, and which was executed, delivered, and recorded as therein appears.

Wherefore, without submitting the rights of the Government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

CHAS. DEVENS,
Att'y Gen'l U. S.

53 Your petitioner finds his title obstructed by a possession under a claim of the United States as purchaser of the said estate at a sale for a direct tax, assessed by that government thereon, of $92.07, with a penalty of 50 per cent. thereof. The claim of the United States is set forth in "tax-sale certificate" of record in the clerk's office for the said county of Alexandria, and is in the words and figures following, to wit:

"UNITED STATES OF AMERICA, *District of Virginia:*

"TAX-SALE CERTIFICATE.

"Whereas John Hawxhurst, Gillet T. Watson, and William I. Boreman having been, by virtue of an act of Congress, approved June 7, 1862, entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes', by the President, by and with the advice and consent of the Senate, duly appointed tax-commissioners, and thereby constituted a board of three tax-commissioners for the insurrectionary districts of the State of Virginia, to wit, so much of said State as was by the President of the United States, by his proclamation of July 1, 1862, proclaimed to be in insurrection, and the civil authority of the Government of the United States so obstructed that the act of Congress, approved August 5, 1861, named in the act aforementioned, could not be peaceably executed, said William I. Boreman having resigned, and the President, by and with the advice and consent of the Senate, having on the 28th day of January, A. D. 1864, appointed A. Lawrence Foster in his stead, the undersigned, composing the board of tax-commissioners as now constituted, do hereby certify that the commissioners did, in compliance with the acts of Congress aforesaid, on the 15th day of September, 1863, fix the sum of $92.7 as the amount of tax by virtue of said act of August 5, 1861, due and payable to the United States, charged upon the following described lot or parcel of land situated in the county of Alexandria, in said State, to wit, Arlington, on Georgetown road, northwest from the court-house nine miles, lately occupied by Robert E. Lee, and bounded as follows: On the north by the land of Ross; east by the Potomac River; south by the land of James Roach, Johnson, and Guy Henry; west by the land of Elliot, Columbus Alexander, and John Tucker, containing 1,100 acres, be the same more or less, said to have belonged to Mary A. R. Lee, and charged to her on the land-book of the State aforesaid for the year 1860, and valued on said book at $34,100; said sum of $92.07 bearing the same direct proportion to the whole amount of direct tax, namely, $$937,550.66\frac{2}{3}$$, apportioned to said State by the act of Congress of August 5, 1861, as the value of said parcel of land was estimated to bear to the whole valuation of the real estate in said State of Virginia, subject to said direct tax, according to the last assessment and valuation of said real estate, and the several parcels thereof, made under the authority of said State previous to the 1st day of January, A. D. 1861, to wit, the assessment and valuation for the year 1860, whereby in addition to said tax charged upon said parcel of land, a sum of fifty per centum of said tax became charged thereon, and that no owner or owners of said lot or parcel of land did, within sixty days after the commissioners did, on the aforesaid 15th day of September, 1863, so fix said amount, pay the tax thus charged upon the said lot or parcel of land into the Treasury of the United States, or to the commissioners holding said office during said term, or to any such commissioners, at any time, by reason of which nonpayment said piece or parcel or land became forfeited to the United States; and accordingly the said commissioners caused the same to be advertised for sale, describing in said advertisement the aforesaid parcel of land, and distinctly stating therein said amount of $92.07 as the amount of direct tax assessed on said tract or parcel, in a newspaper published in said county of Alexandria, where said land is situate, namely, in the newspaper called the Virginia State Journal, published

in the city of Alexandria, in said county, for four weeks previous to the day of sale; and did further advertise as above, by posting notice of said sale in three public places in said county four weeks previous to said day of sale, which day of sale was advertised by said publication and said posting to take place on the 11th day of January, A. D. 1864, and thereafter on said day last named so advertised, and at the place of sale so advertised, to wit, in said city and county of Alexandria, said commissioners did cause the same to be offered for sale to the highest bidder who would bid a sum not less than the tax and penalty aforesaid, with the lawful costs and ten per cent. per annum interest on said tax then accrued; and no person bidding the same or a larger sum than the sum hereinafter named, and said tract, lot, or parcel of land having been selected under the direction of the President, in pursuance of an order, of which the following is a copy:

"'Whereas by the act of 1862, chapter 98, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," it was enacted that certain land
54 in said insurrectionary districts should be charged with taxes, and that said land should be sold for non-payment thereof, as therein provided; and whereas by the act of 1863, chapter 21, approved February 6, said act of 1862 was amended; and whereas, by virtue of the power in said acts conferred, "at any such sale, any tracts, parcels, or lots of land which might be selected under the direction of the President for government use, for war, military, naval, revenue, charitable, educational, or police purposes, might at said sale be bid in [by the commissioners appointed under said act], under directions of the President, for and struck off to the United States."

"'And whereas the President, with the advice and consent of the Senate, has, in pursuance of law, appointed John Hawxhurst, William I. Boreman, and G. F. Watson as tax commissioners within and for the State of Virginia; and whereas the real estate hereinafter described has become charged with taxes to the United States, and by reason of the non-payment thereof, and of the penalty lawfully assessed thereon, is forfeited to the United States, and has become liable to be sold under the provisions of the acts aforesaid; and whereas the said estate has been advertised to be sold for non-payment of said taxes and penalty on the 11th day of January, 1864, according to law; and whereas the President of the United States, by virtue of the authority vested in him as aforesaid, has selected for government use for war, military, charitable, and educational purposes, the land hereinafter described:

"'Now, therefore, I, Abraham Lincoln, President of the United States, have ordered and directed, and hereby order and direct said commissioners to bid in and have struck off to the United States the following described tract of land for the purposes aforesaid, and in pursuance of the statutes on that behalf provided, namely, the Arlington estate, lately occupied by Robert E. Lee, bounded as follows: North by the land of Ross; east, by the Potomac River; south, by the land of James Roach, Johnson, and Guy Henry; west, by the land of Elliot, Columbus Alexander, and John Tucker; containing eleven hundred acres, be the same more or less.

"'ABRAHAM LINCOLN,
"'*President of the United States.*

"'EXECUTIVE MANSION,
"'*Washington, 6th Jan.*, 1864.'

"For government use for war, military, charitable, and educational purposes, said commissioners did bid in the same to the United States for the sum of twenty-six thousand and eight hundred dollars, being not less than the taxes, penalty, and cost, and 10 per centum per annum interest on said taxes.

"In testimony whereof said commissioners have hereunto affixed their signatures on this 25th day of September, A. D. 1866.

"JNO. HAWXHURST,
"GILLET F. WATSON,
"A. LAWRENCE FOSTER,
"*United States Direct Tax Commissioners for Virginia.*"

"STATE OF VIRGINIA,
"*Alexandria County, to wit:*

"Personally appeard before me, a justice of the peace for the State and county aforesaid, John Hawxhurst, Gillet F. Watson, and A. Lawrence Foster, parties signing the above paper, and they severally acknowledged the same to be their act and deed.

"Given under my hand this 7th day of March, 1867.

"ROBERT BELL, *J. P.*"

"VIRGINIA:

"ALEXANDRIA COUNTY COURT,
"*Clerk's Office, March* 7, 1867.

"The foregoing certificate of sale, with the acknowledgment, was this day admitted to record.

"Teste:

"JEFFERSON LACY, *Clerk.*"

55 (Endorsed:) 1327. U. S. circuit court, eastern dist. of Virginia. Fredrick Kauffman et als. ads. G. W. C. Lee. In ejectment. Motion to dismiss proceedings. Filed July 16th, 1877. M. F. Pleasants, clerk.

And at another day, to wit, at a circuit court, held in and for the eastern district of Virginia, at Norfolk, in said district, on the 19th day of July, 1877, an order was entered in this cause; which order is in the words and figures as follows, to wit:

Order for rule.

In the circuit court of the United States for the eastern district of Virginia.

GEORGE W. C. LEE *vs.* FREDERICK KAUFMAN, R. P. STRONG AND others.	In ejectment.

Suggestion having been made by the Attorney-General for the United States, that the property in controversy in this cause is in the use and possession of the United States, under claim of title, of record, and such suggestion having been filed, together with a motion for those reasons to set aside the declaration and dismiss the proceedings, and for such other orders as may be proper, as more fully appears by such suggestion and motion on file in the office of the clerk of this court at Alexandria:

Ordered, that a rule issue requiring the plaintiff to show cause at the court-house in Alexandria, on the 4th of September, 1877, or as soon thereafter as counsel can be heard, why such motion should not be granted, provided that such rule be served upon the plaintiff or his counsel on or before the 1st day of August, 1877.

RO. W. HUGHES, *Judge.*

NORFOLK, 19TH JULY, 1877.

Upon which order a rule was issued; which rule, with the return and endorsements thereon, is in the words and figures following, to wit:

56 *Rule.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

The President of the United States of America to the marshal of the eastern district of Virginia, greeting:

We command you to summon George W. C. Lee, if he shall be found in your district, to be and appear before our judges of our circuit court of the United States for the said district, to show cause, at the court-house in the city of Alexandria, in said district, on the fourth day of September, 1877, or as soon thereafter as counsel can be heard, why for the reasons set forth in a suggestion of the Attorney-General of the United States, on file in the office of the clerk of this court at Alexandria aforesaid, the motion filed by him to set aside the declaration and to dismiss the proceedings, and for such other order as may be proper in the cause of Geo. W. C. Lee against Fredrick Kauffman and others in ejectment, should not be granted; and have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 23d day of
57 July, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 102d.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Return.

Executed this 24th day of July, 1877, by delivering to Francis L. Smith, att'y for G. W. C. Lee, in person, a true copy of the within.

C. P. RAMSDELL,
U. S. Marshal,
By I. C. O'NEAL, *Dep't.*

(Endorsed:) 1327. Geo. W. C. Lee vs. Fred'k Kauffman et als. Rule to show cause. Returnable 4th Sept., 1877. (C. P. Ramsdell, U. S. marshal, received July 23d, 1877. East district Virginia.) Filed July 24th, 1877. M. F. Pleasants, clerk.

And at another day, to wit, on the 24th day of July, 1877, came the defendants, by counsel, and filed in the clerk's office of this court a notice of motion for hearing; which notice, with return and endorsements thereon, is in the words and figures following, to wit:

58 *Notice.*

In the circuit court of the United States for the eastern district or Virginia.

GEORGE W. C. LEE
vs.
FREDRICK KAUFFMAN, R. P. STRONG, & others. } In ejectment.

Take notice that, in accordance with suggestion and motion of the Attorney-General of the United States, on file in the office of the clerk of this court, at Alexandria, Va., motion will be made at the court-house in Alexandria, on the 4th day of September, 1877, or as soon thereafter as counsel can be heard, that the declaration in the above-entitled cause be set aside, that the proceedings therein be stayed and dismissed, and for such other order as may be proper in the premises.

W. WILLOUGHBY,
Of Counsel for the United States.

To GEORGE W. C. LEE, *Plaintiff.*

Return.

59 Executed this 24th day of July, 1877, by delivering to Francis L. Smith, att'y for G. W. C. Lee, in person, a true copy of the within.

C. P. RAMSDELL,
U. S. Marshal,
By I. C. O'NEAL, *Dep't.*

(Endorsed:) 1327. U. S. circuit court, eastern dist. of Va. G. W. C. Lee vs. Fredrick Kauffman et als. In ejectment. Notice for hearing. Filed July 24th, 1877. M. F. Pleasants, clerk.

And at another day, to wit, on the 4th day of September, 1877, came the parties, plaintiff and defendant, by counsel, and filed in the clerk's office of this court their stipulation in this cause; which said stipulation, with the endorsements thereon, is in the words and figures following, to wit:

Stipulation.

In the circuit court of the United States for the eastern district of Virginia.

GEO. W. C. LEE
vs.
FREDRICK KAUFFMAN & OTHERS.

60 It is hereby stipulated that the motion founded upon the suggestion filed by the Attorney-General of the United States in this cause, be continued until the *the* next January term of this court, with the understanding that the cause is not then to be tried; that at least thirty days before such term of court each party shall furnish to the other a brief with the authorities intended to be relied upon, so far as then ascertained; that issue will be made to such suggestion; that

notice will by that time be given of any points intended to be made, if any, upon the question of right of removal from the State court to this court, or the regularity of such removal; and that the suit of this plaintiff against Branham and others shall abide the event of this suit, or, if desired by either party, the two suits shall be consolidated.

WM. J. ROBERTSON,
LEGH R. PAGE,
FRANCIS L. SMITH, JR.,
Plaintiff's Counsel.
W. WILLOUGHBY,
For the United States.

(Endorsed:) 1327. Lee vs. Kauffman et als. Stipulation of counsel, 4th September, 1877. Filed September 4th, 1877. M. F. Pleasants, clerk.

61 And at another day, to wit, on the 2d day of March, 1878, came the plaintiff, by counsel, and filed in the clerk's office of this court their answer to rule, &c.; which answer and demurrer, with the endorsements thereon, are in the words and figures following, to wit:

Answer to rule.

In the circuit court of the United States for the eastern district of Virginia.

GEORGE W. C. LEE, PLAINTIFF,
against
FREDERICK KAUFMAN, R. P. STRONG & ALS., defendants.

The plaintiff, not waiving, but still, so far as he may lawfully do, insisting upon his motion to remand the cause to the State court, for answer to the summons requiring him to show cause why the motion of the Attorney-General of the United States to set aside the declaration and to dismiss the proceedings in the above-entitled cause, for the reasons set forth in a suggestion of the said Attorney-General, which has been filed therein, should not be granted, says and for cause shows:

1st. That said suggestion should be dismissed as not being a proper mode of making an objection to the jurisdiction of the court.

2d. That said suggestion and the matters therein contained, in manner and form as they are therein set forth, are not sufficient in law to sustain said motion, or to show that any relief whatsoever should be granted under the application made by said Attorney-General; and that the plaintiff ought not to be required to make any further or other answer thereto.

3d. If this his demurrer should be overruled, and he should be required to make further answer to said suggession, the plaintiff says:

That he does not admit it to be true, as is set forth in said suggestion, that the United States are in possession of the property in controversy in this suit by their officers and agents, charged on behalf of the government with the control of the property.

One of the defendants, Maria C. Spyhax, is in possession of and holds a portion of said property under an act of Congress approved on the 12th of June, 1866, entitled "An act for the relief of Maria Syphax" (14 United States Statutes at Large, chapter cxxi, p. 589), whereby the title to seventeen acres and fifty-three one-hundredths of an acre, be

the same more or less, being a part of the property in controversy in this suit, was released and confirmed unto the said Maria Syphax, her heirs and assigns, the said Maria C. Syphax and the said Maria Syphax being one and the same person.

The plaintiff is informed, and believes it to be true, that a very large majority of the other defendants are in fact tenants of the Government of the United States, rendering valuable services in work and labor done and performed by them for said government, in consideration of being permitted by it to occupy and use the lands of which they are respectively in possession.

The plaintiff further says that the United States have no other or further title to the property in controversy in this suit than that which was acquired by them as purchasers at a sale thereof for taxes made by John Hawxhurst, Gillett F. Watson, and A. Lawrence Foster, as United States direct-tax commissioners for Virginia, and shown by their certificate of sale, a copy of which is filed with said suggestion, and that the consent of the State of Virginia has never been obtained to such purchase.

62 The plaintiff, therefore, denies it to be true, as is set forth in said suggestion, that the property in controversy in this suit has been or is now held, occupied, or possessed by the United States through their officers and agents charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, and calls for full proof of each and all of said allegations.

G. W. C. LEE.

STATE OF VIRGINIA,
Rockbridge County, to wit:

I, John C. Bonde, a notary public in and for the county and State aforesaid, hereby certify that George W. C. Lee, whose name is signed to the foregoing paper which is proposed to be filed by him in a case pending in the circuit court of the United States for the eastern district of Virginia, in which he is plaintiff and Fredrick Kauffman and others are defendants, this day personally appeared before me, and having been duly sworn, made oath that the demurrer therein contained is not interposed for delay, and that the statements of fact in said paper set forth are true to the best of his knowledge, information, and belief.

Given under my hand and seal notarial this 7th day of January, 1878.

[SEAL.] JOHN C. BONDE,
Notary Public.

63 (Endorsed:) 1327. G. W. C. Lee vs. Kauffman et als. Answer to rule, &c. Filed March 2nd, 1878. M. F. Pleasants, clerk.

And at another day, to wit, on the 5th day of March, 1878, in the March term of said court, the following amongst other proceedings were had, and appear of record in the words and figures following, to wit:

Denial of motion to remand.

In the circuit court of the United States for the eastern district of Virginia, at Alexandria.

G. W. C. LEE
vs.
KAUFFMAN ET AL. } In ejectment.

Be it remembered that the plaintiff having heretofore moved the court to remand this cause to the circuit court of Alexandria County, State of Virginia, because the same was removed from said circuit court, contrary to the provisions of the statute in such case made and provided, came on this day to be heard, and was argued by counsel. On consideration whereof, the court doth overrule said motion, to which ruling of the court, denying said motion, and refusing to remand said cause,
64 the plaintiff, by his counsel, excepts, and tenders this his bill of exceptions, which he prays may be signed, sealed, and enrolled; which is accordingly done.

RO. W. HUGHES, *Judge.* [SEAL.]

And on another day, to wit, on the 5th day of March, 1878, came the parties by their attorneys, and the court having maturely considered of its judgment, on the plaintiff's demurrer to be rendered, sustains the said demurrer to the said suggestion and motion of the Attorney-General of the United States, for reasons stated in writing, and made part of this record, as follows, to wit:

Opinion of court upon demurrer.

United States circuit court, E. D. of Virginia.

G. W. C. LEE
v.
KAUFMAN ET AL. }

The plaintiff brings his action of ejectment to recover the Arlington estate, near Alexandria, Virginia. The case was heard at Alexandria on the 2d, 4th, and 5th of March, 1877, upon suggestion made by the Attorney-General of the United States, and his motion to dismiss the case, and the plaintiff's demurrer to the suggestion.

This cause is before the court in a form not heretofore known to American precedent; that is to say, it presents a case in which the sovereignty, sued, comes into court, in the first incipiency of the proceeding, deigning to protest its exemption from amenability to the action, but disdaining to submit itself to the jurisdiction of the court.

The court holds that the appearance of the government by suggestion, in the person of its chief law officer, is not inadmissible, though unusual in American practice.

That the government may be sued indirectly in regard to personal property in actions not attended by a seizure of the property, out of its officer's possession, on mesne process, and that a court will not be deterred from adjudicating such a cause by the presumption that the government will not make restitution without the indecent interposition of the court's writ of execution.

That the fact that the Federal Government is claimant by record title of property which is made the subject of an indirect suit against it, is in possession of the property, and in the actual use of it for public purposes, cannot defeat the jurisdiction of the court to look into the grounds of its title, and decide the action upon its merits.—Ed. Internal Revenue Record.

The decision of the court was rendered on the 15th March, as follows:

HUGHES, J.:

The court has received most valuable aid and instruction from the counsel on each side in this cause. The printed briefs submitted have brought out all the learning of the subject; and the oral arguments at bar have been characterized by rare strength and clearness. Added to these are the decisions in Dreux v. Kennedy, of the supreme court of Louisiana, rendered in 1846, 12 Robinson, 489, and of the supreme court of Massachusetts in Briggs v. The Light Boats, rendered in 1871, 11 Allen, 157; which exhibit a research rarely displayed even in discussions from the bench of those States.

I should be without excuse, therefore, if I should fail to make clear the principles of law which control in the decision of the interesting questions which are presented in this important cause.

As necessary to an intelligent understanding of what is to be said on the questions of law now to be decided, I must set out the facts of the case as shown by the record. I will connect with them some other facts derived aliunde, chiefly from the briefs of counsel, which are inseparable from those exhibited in the pleadings, but to which I shall allow no technical value, and which will be seen not at all to influence the judgment of the court. I conceive the facts of the case to be as follows:

The late G. W. Parke Custis was the owner in fee of the tract of eleven hundred acres of land which is the subject of this controversy. It is known as the Arlington estate. It is situated south of the Potomac River in Alexandria County, Virginia, and forms a conspicuous part of the landscape which presents itself to the eye in looking southward from the Capitol at Washington. I need not add that it is an estate of great value, and of profound historical interest.

Mr. Custis, who died in 1857, devised this estate to his only child, Mrs. Mary A. R. Lee (wife of General Robert E. Lee), to be held during the term of her natural life, and at her death to pass in remainder to his eldest grandson G. W. Custis Lee, the plaintiff in this cause, to be held in fee.

During the civil war this estate, with the Arlington mansion, was unoccupied by its owner, Mrs. Lee, who was then living; and the title did not pass to her son until 1873, the date of her death.

On the 5th August, 1861, the United States Congress passed
65 "An act to provide increased revenue from imports to pay interest on the public debt, and for other purposes." On the 7th June, 1862, it passed "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes." And on the 6th February, 1863, it enacted still another law entitled "An act to amend an act entitled an act for the collection of direct taxes," etc. The first-named law imposed a direct annual tax upon the United States of $20,000,000, and apportioned to Virginia the sum of $937,552, on account of which tax the assessment upon Arlington was $92.07.

On the 11th of January, 1864, the whole estate of eleven hundred

acres was sold for the payment of this tax by John W. Hawxhurst, Gillett F. Watson and A. L. Foster, who were the duly appointed and confirmed direct-tax commissioners of the United States for Virginia. The price bid by the government was $26,800, an amount exceeding the means of any friend of the owner who might have desired to buy in the property for him. It was so bought in by the tax commissioners, under authority of that clause of the act of Congress of February 6th, 1863, which empowered the government at such a sale as this was to purchase the lands which might be selected by the President "for government use—for war, military, naval, revenue, charitable, educational or police purposes." The United States at once took possession of the estate, and has held it ever since; no part of the purchase money which would have remained after deducting the tax having ever been paid over either to the life tenant or the remainderman.

The estate is now occupied by Frederick Kaufman, R. P. Strong, and about two hundred other persons. Against all these, by name, as defendants, the plaintiff in April last brought two actions of ejectment (now treated as one) in the circuit court of Alexandria County, Virginia; having postponed his suit until within the last year of the period of five years, after which it would, in some of its objects, have been barred by the statute of limitations.

The notice of ejectment was served personally on each occupant; and the declaration was filed at the May rules following.

In due course of procedure the defendants all appeared by counsel and demurred and pleaded; their plea being the general issue authorized by statute. The cause was thus matured for trial at the term of the State court which was held July, 1877.

Before the commencement of that term, however, the defendants filed a petition here for the removal of the cause to this court from the State court. The petition was founded upon section 643 of the Revised Statutes of the U. S., which authorizes any officer of the United States, or any person holding estate by title derived from any officer of the United States, when sued in a State court by any proceeding affecting the validity of any revenue law of the United States, to remove the cause into a circuit court of the United States.

Among the recitals of their petition the defendants say:

"Your petitioners say that they do not claim the title to said land, or interest therein, except as follows, to wit: A certain portion thereof, consisting of about two hundred acres thereof, more or less, is in charge of the War Department of the United States, and is being used as a national cemetery for the burial of deceased soldiers and sailors of the United States; and the said defendant Kaufman is a superintendent thereof, under directions of said War Department. The remaining portion of said premises is set apart as a military post and reserve connected therewith of the United States, and is now in charge of the defendant Strong, who is an officer of the United States, and occupying the same under orders of the War Department, and in obedience to an order thereof, of which the following is a copy, to wit:

"'WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,
"'*Washington, D. C., July* 26, 1872.

"'The Quartermaster-General, U. S. Army:

SIR: The Secretary of War directs that all that part of the Arlington estate outside the walls of the national cemetery be considered a military reservation pertaining to Fort Whipple, Virginia, and under

the immediate charge of the commanding officer of that fort. The Secretary has approved your recommendation, that those persons who have crops on the proposed sites for new buildings shall be compensated therefor from the contingencies of the Army. A board of survey has assessed the total amount at $540, which has been ordered to be paid to the parties; also, that the copy of the survey describing the metes and bounds of the Arlington estate be filed in the Quartermaster-General's Office as record of a military reserve, and be recorded in the proper land-record office in Alexandria, Virginia.

"'Very respectfully, your obedient servant.

"'E. D. TOWNSEND,

"'*Adjutant General.*'"

That such of said defendants, except Strong and Kaufman, as are upon the said premises occupy the same not as tenants, but under permission of the officer in charge of said military reservation, which is in writing or printing, and is substantially as follows:

"FORT WHIPPLE, , 187 ,

"This is to certify that permitted to occupy acres of on the Arlington reservation until , 187 . No rent will be charged for this occupation of the reservation to that date.

"*Officer in Charge.*"

Upon the filing of this petition a writ of certiorari was issued hence to the clerk of the Alexandria circuit court under which a copy of the record in the suit was certified here, the cause when brought here being ready for trial on issues joined on the law and facts.

The following proceedings were thereupon had in this court:

"U. S. circuit court, E. D. of Virginia.

"G. W. C. LEE
v.
"FREDERICK KAUFMAN, R. P. STRONG AND others. } In ejectment.

"And now comes the Attorney-General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years, and now is, held, occupied, and possessed by the United States through its officers and agents, charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof as public property of the United States for public uses, in the exercise of their sovereign and constitutional powers as a military station and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery,' and for the uses and purposes set forth in the certificate of sale, a copy of which, as stated and prepared by the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith under claim of title as appears by the said certificate of sale, and which was executed, delivered, and recorded as therein appears.

"Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves

that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

"CHARLES DEVENS.
"*Attorney-General.*"

Then follows the certificate of sale referred to, setting out in full recital the tax title under which the government claims. Upon this suggestion the following rule was issued:

"U. S. circuit court, E. D. of Virginia.

"GEORGE W. C. LEE
v.
"FREDERICK KAUFMAN, R. P. STRONG, AND others. } In ejectment.

"Suggestion having been made by the Attorney-General for the United States that the property in controversy in this cause is in the use and possession of the United States, under claim of title, of record, and such suggestion having been filed, together with a motion for those reasons to set aside the declaration and dismiss the proceedings, and for such other orders as may be proper, as more fully appears by such suggestion and motion on file in the office of the clerk of this court at Alexandria,

"Ordered, that a rule issue requiring the plaintiff to show cause at the court-house in Alexandria on the 4th of September, 1877, or as soon thereafter as counsel can be heard, why such motion should not be granted, provided that such rule be served upon the plaintiff or his counsel on or before the 1st day of August, 1877.

"RO. W. HUGHES,
"*Judge.*

"NORFOLK, 19*th July*, 1877."

In response to this rule the plaintiff filed the following answer and demurrer:

"U. S. circuit court, E. D. of Virginia.

"GEORGE W. C. LEE, PLAINTIFF,
v.
"FREDERICK KAUFMAN, R. P. STRONG AND als., defendants. }

"The plaintiff, not waiving, but still, so far as he may lawfully do, insisting upon his motion to remand the cause to the State court, for answer to the summons requiring him to show cause why the motion of the Attorney-General of the United States to set aside the declaration and to dismiss the proceedings in the above-mentioned cause, for the reasons set forth in the suggestion of the said Attorney-General, which has been filed therein, should not be granted, says and for cause shows:

66 "1st. That said suggestion should be dismissed as not a proper mode of making an objection to the jurisdiction of the court.

"2d. That the said suggestion and the matters therein contained, in matter and form as they are therein set forth, are not sufficient in law to sustain said motion, or to show that any relief whatsoever should be

the immediate charge of the commanding officer of that fort. The Secretary has approved your recommendation, that those persons who have crops on the proposed sites for new buildings shall be compensated therefor from the contingencies of the Army. A board of survey has assessed the total amount at $540, which has been ordered to be paid to the parties; also, that the copy of the survey describing the metes and bounds of the Arlington estate be filed in the Quartermaster-General's Office as record of a military reserve, and be recorded in the proper land-record office in Alexandria, Virginia.

"'Very respectfully, your obedient servant,

"'E. D. TOWNSEND,

"'*Adjutant General.*'"

That such of said defendants, except Strong and Kaufman, as are upon the said premises occupy the same not as tenants, but under permission of the officer in charge of said military reservation, which is in writing or printing, and is substantially as follows:

"FORT WHIPPLE, , 187 ,

"This is to certify that permitted to occupy acres of on the Arlington reservation until , 187 . No rent will be charged for this occupation of the reservation to that date.

,

"*Officer in Charge.*"

Upon the filing of this petition a writ of certiorari was issued hence to the clerk of the Alexandria circuit court under which a copy of the record in the suit was certified here, the cause when brought here being ready for trial on issues joined on the law and facts.

The following proceedings were thereupon had in this court:

"U. S. circuit court, E. D. of Virginia.

"G. W. C. LEE
v.
"FREDERICK KAUFMAN, R. P. STRONG AND others. } In ejectment.

"And now comes the Attorney-General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years, and now is, held, occupied, and possessed by the United States through its officers and agents, charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof as public property of the United States for public uses, in the exercise of their sovereign and constitutional powers as a military station and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery,' and for the uses and purposes set forth in the certificate of sale, a copy of which, as stated and prepared by the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith under claim of title as appears by the said certificate of sale, and which was executed, delivered, and recorded as therein appears.

"Wherefore, without submitt*ed* the rights of the government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves

that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

"CHARLES DEVENS.
"*Attorney-General.*"

Then follows the certificate of sale referred to, setting out in full recital the tax title under which the government claims. Upon this suggestion the following rule was issued:

"U. S. circuit court, E. D. of Virginia.

"GEORGE W. C. LEE
v.
"FREDERICK KAUFMAN, R. P. STRONG, AND others. } In ejectment.

"Suggestion having been made by the Attorney-General for the United States that the property in controversy in this cause is in the use and possession of the United States, under claim of title, of record, and such suggestion having been filed, together with a motion for those reasons to set aside the declaration and dismiss the proceedings, and for such other orders as may be proper, as more fully appears by such suggestion and motion on file in the office of the clerk of this court at Alexandria,

"Ordered, that a rule issue requiring the plaintiff to show cause at the court-house in Alexandria on the 4th of September, 1877, or as soon thereafter as counsel can be heard, why such motion should not be granted, provided that such rule be served upon the plaintiff or his counsel on or before the 1st day of August, 1877.

"RO. W. HUGHES,
"*Judge.*

"NORFOLK, 19*th July*, 1877."

In response to this rule the plaintiff filed the following answer and demurrer:

"U. S. circuit court, E. D. of Virginia.

"GEORGE W. C. LEE, PLAINTIFF,
v.
"FREDERICK KAUFMAN, R. P. STRONG AND als., defendants.

"The plaintiff, not waiving, but still, so far as he may lawfully do, insisting upon his motion to remand the cause to the State court, for answer to the summons requiring him to show cause why the motion of the Attorney-General of the United States to set aside the declaration and to dismiss the proceedings in the above-mentioned cause, for the reasons set forth in the suggestion of the said Attorney-General, which has been filed therein, should not be granted, says and for cause shows:

66 "1st. That said suggestion should be dismissed as not a proper mode of making an objection to the jurisdiction of the court.

"2d. That the said suggestion and the matters therein contained, in matter and form as they are therein set forth, are not sufficient in law to sustain said motion, or to show that any relief whatsoever should be

granted under the application made by said Attorney-General; and that the plaintiff should not be required to make any further or other answer thereto.

"3d. If this his demurrer should be overruled, and he should be required to make further answer to said suggestion, the plaintiff says:

"That he does not admit it to be true, as set forth in said suggestion, that the United States are in possession of the property in controversy in this suit by their officers and agents, charged on behalf of the government with the control of the property.

"One of the defendants, Maria C. Syphax, is in possession of and holds a portion of said property under an act of Congress approved on the 12th of June, 1869, entitled "An act for the relief of Maria Syphax (14 United States Statutes at Large, chapter cxxi, p. 589), whereby the title to seventeen acres and fifty-three one-hundredths of an acre, be the same more or less, being a part of the property in controversy in this suit, was released and confirmed unto the said Maria C. Syphax, and the said Maria Syphax being one and the same person.

"The plaintiff is informed, and believes it to be true, that a very large majority of the other defendants are in fact tenants of the Government of the United States, rendering valuable services in work and labor done and performed by them for said government, in consideration of being permitted by it to occupy and use the lands of which they are respectively in possession.

"The plaintiff further says that the United States have no other or further title to the property in controversy in this suit than that which was acquired by them as purchasers at a sale thereof for taxes, made by John Hawxhurst, Gillett F. Watson, and A. Lawrence Foster, as United States direct-tax commissioners for Virginia, and shown by their certificate of sale, a copy of which is filed with said suggestion, and that the consent of the State of Virginia has never been obtained to such purchase.

"The plaintiff therefore denies it to be true, as is set forth in said suggestion, that the property in controversy in this suit has been or is now held, occupied or possessed by the United States through their officers and agents, charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof as public property of the United States *with the control of the property, and who are in the actual possession thereof as public property of the United States* for public uses in the exercise of their sovereign and constitutional powers, and calls for full proof of each and all of said allegations.

"G. W. C. LEE."

Thus the suit is here not only on the issues of law and fact made up before the removal from the State court, but on the suggestion of the Attorney-General and the plaintiff's demurrer to the suggestion and answer to the rule nisi.

Such are the facts in the case as it stands upon the record. It is now heard upon the plaintiff's demurrer to the suggestion, upon the whole record, up to and including the demurrer.

And on that demurrer, the first inquiry is, whether it is competent for the government, in the person of its chief law officer, to appear by suggestion at all; and the second is, assuming that the suggestion is a proper form of proceeding, does it set forth such a case in connection with the antecedent record as, conceding the facts to be true, entitles the government to a dismissal of these proceedings, in pursuance of the motion of the Attorney-General?

Though I concede that the intervention of the government in this manner, in a cause pending between other parties, is unusual in our American practice, I do not see that for that reason it is inadmissible. It was sanctioned by the Supreme Court of the United States in the cases of Florida v. Georgia, 17 Howard, 478; Maxwell's Lessee v. Levy, 2 Dallas, 381; and The Exchange, 7 Cranch, 117; as well as others which might be cited. It was allowed in the case of The Pizarro, 10th New York Legal Observer, 97.

I believe that intervention by this method is the settled practice in England; it was, for instance, the proceeding taken by the attorney-general in Legh v. Rose, 8 Meeson and Welsby, 579. On authority, therefore, I do not feel at liberty to question the right of the Attorney-General to intervene by suggestion in a cause in which the government is alleged to be interested, as in this cause.

Nor is there any validity in the objection that a new and side issue is introduced into the cause by this proceeding. It is nothing more in effect than another form of a plea to the jurisdiction. This plea always introduces a preliminary issue requiring to be dealt with before the cause can proceed upon the merits; and the present demurrer is, in effect, an issue of law joined on a plea to the jurisdiction; which is not anomalous, and works no hardship.

We come, therefore, to the questions of law presented by the suggestion and demurrer. These are two:

1st. Whether the Attorney-General's suggestion is of itself sufficient to defeat the jurisdiction of the court over the cause; and,

2d. Whether, supposing it has not that effect ipso facto, the court may look into the grounds on which that officer intervenes; in pursuance of the observation made by Chief-Justice Marshall in the case of the United States v. Peters, 5 Cranch, 115:

"It certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title."

I should compromise the judicial office if I were to devote any serious argument to the first of these questions.

The right of every citizen to a judicial determination of a controversy affecting his liberty or property, in which he may be involved, will not be denied at this day in this country. The courts are open to the humblest citizen, and there is no personage known to our laws, however exalted in station, who by mere suggestion to a court can close its doors against him. I have no thought that the chief law officer of the United States, who in the performance of his duty in this cause has entered the suggestion now under consideration, claims for his action any such prerogative as that in question.

But even if it were possible to conceive that such a pretension could be made, let it be answered that it is a cardinal tenet of the Constitution that the judiciary are an independent branch of the government, not to be controlled in its dispensations of justice by interference from other departments, and not only empowered but bound to administer the right without fear, favor or affection. It is useless to dwell upon these topics, but it is appropriate to recall what has been said by luminous jurists of a former era in regard to the decision of questions arising between citizens and their government. In Book II, Ch. XIV., sec. 213, Vattel has these sentences:

"If any difficulties arise [on questions of contract and title between the sovereign and private persons] it is equally conformable to the rules

of decorum, to that delicacy of sentiment which ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the State. And this, indeed, is the practice of all civilized states which are governed by settled laws."

In the same spirit were the utterances of Mr. Selden, one of England's most illustrious scholars and lawyers, in the time of the First Charles:

"In all cases, my Lords, when any right or liberty belongs to the subject, by any positive law written or unwritten, if there were not also a remedy by law for the enjoying or regaining this right or liberty, where it is violated or taken from him, the positive law were most vain and to no purpose; and it were to no purpose for any man to have any right in any land or other inheritance, if there were not a known remedy, that is, an action or writ, by which, in some court of ordinary justice, he might recover it. And in this case of right or liberty of person, if there were not a remedy in the law for regaining it when it is restrained, it were of no purpose to speak of laws that ordain it should not be restrained." 3 Howell's State Trials, 95.

If the hereditament of an English subject could be taken and held by the king without question in the courts, the notable words which the elder Pitt pointed at George Third would have had no truth or meaning:

"The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail, its roof may shake, the wind may blow through it, the storms may enter, the rain may enter, but the King of England cannot enter! All his forces dare not cross the threshold of the ruined tenement."—Speech on the Excise Act.

If there could be no judicial inquiry into the government's possession of property claimed by a citizen, what could be said of the clause in the fifth amendment to the Constitution, forbidding that private property shall be taken for public use without just compensation, except that it was an unmeaning form of empty words, a delusive safeguard against public wrong, a deceptive guaranty of private rights?

The only alternative which would be left to the plaintiff, if this suggestion should prevail, as confessed by counsel for the government, would be what Mr. Justice Grier once characterized as "the
67 hopeless remedy of a petition to Congress." The effect would be to defeat a judicial adjudication of the rights of parties, and to refer the plaintiff's claims, for political determination, to a political tribunal. If the fact be, as implied by the suggestion, that there is no method known to the judicature of the country by which the rights of the parties to this action could be judicially determined, it would be a reproach to the American jurisprudence. In every sense would the result in this case be unfortunate.

So much of sentiment—so much of sectional sentiment—invests this estate of Arlington, at once the burial-ground of soldiers, who lost their lives for the Union, and the patrimony of the Lees, that it were in the highest degree desirable that its title should have a judicial determination rather than to be relegated to the debate and vote of a popular assembly, always more or less liable to the influences of partisan passion.

It would, therefore, be somewhat excusable in the court if it should apparently lean, in its consideration of this suggestion of the government, in favor of retaining its jurisdiction of such a cause as that at bar.

I come now to look into the grounds on which the Attorney-General,

through counsel here, claims that the court should stay its action and dismiss the cause.

It is conceded on all hands that the sovereign power in this country, whether it be a State or the United States, cannot be made a direct party defendant in any action except by its own consent, given generally by statute, or specially by its authorized law officer.

And the question here is whether it can be made so indirectly; and, in the present instance, whether the United States can be made so indirectly in an action brought against defendants who are the occupants of lands which it claims to own. Conceding under protest that the law may be against them on this broad proposition, counsel for the government themselves narrow this latter question, and say that even though a suit may be brought indirectly against the United States, yet that cannot be where the proceeding takes the form of an action of ejectment brought against defendants who are occupants of lands which the government claims by prima facie title of record, of which it is in actual possession by its officers, and which it claims to be actually using for public purposes. Such is the exact pretension made in this cause by the government.

On the part of the plaintiff it is contended that the government does not hold the Arlington estate as a sovereign, for the reason that the jurisdiction of Virginia over it has never been surrendered, but that it holds it only in a corporate capacity by the same tenure as, and with no other prerogative than, that by which a private corporation or citizen would hold the land in Virginia. I am not sure that the enquiry is material, but in deference to the views of counsel I will consider these respective pretensions in the light of the facts of the record.

How does the government hold this property? By whom and for what public purpose? And does it hold it in its sovereign or corporate capacity?

The estate consists of eleven hundred acres. Less than a fourth of it—two hundred acres—is set apart as a national cemetery. This parcel is undeniably occupied by an officer of the government and used for a necessary public purpose—a purpose, indeed, which no individual in the land would be willing to see defeated.

The rest of the land, nine hundred acres, is occupied by some two hundred people, whom I judge from the record to be poor people, as every one but two or three signs his name with an attested cross-mark. Of all the occupants of this nine hundred acres only one (R. P. Strong) is shown to be an officer of the government. They are mostly tenants of the government, but paying no rent. The record shows that this land was not, until as late as 1872, "set apart and held as a military post and reserve connected therewith," and directed to be "considered a military reservation pertaining to Fort Whipple." For this land the government seems to have so little use that it allows it to be occupied for their own purposes, probably in mere charity, by nearly two hundred people in the humblest walks of life.

Is it in fact a military reservation connected with a military post? Can it be more than "considered" so? A military post is a place at which troops are posted, or intended to be posted, and without the troops, or the probability or the intention of troops being posted on it, a tract of ground cannot be a military post. Laying out the plan of a city in a forest and calling it a city does not make it so; it remains a forest still. In the theoretical sense only is Fort Whipple a military post and the lands around it a military reservation. The surface of Virginia is studded over with such "forts," and the only happy thought

connected with them is that they are forts no longer. It is so in fact with Fort Whipple, and it is a painful anachronism now to "consider" it as still a fort. Yet the name Fort Whipple implies that it was intended as a missionary rather than a military post.

Not only is the land thus set apart and directed to be considered a military reservation almost wholly occupied by persons who are not agents or officers of the government, but the government has shown in another way how little real bona fide use it has for it. I consider that I may allude to the acts of Congress as part of this record, for the judicial mind dwells in the laws of the country, and that of the Federal courts in the statutes of Congress, from which they derive all their jurisdiction. The action of these courts is wholly based on the statutes, so that the record of such a court is a palempsest originally inscribed with the statute law of the subject, overwritten with the proceeding in the particular case. In 14 Statutes at Large, 589, is an act of Congress within the judicial cognizance of the court releasing about eighteen acres of this land to Maria C. Syphax without consideration.

Of course it cannot be contended that either this parcel or the eight hundred and eighty-two acres which is directed to be considered as a military reservation is in any but the nominal use of the government.

Justice is figuratively thought to be blindfold, but it cannot be supposed that a court of justice sitting in Alexandria, in full view of this reservation, can by any reasonable fiction (the matter entering as an element in a question which it is called upon to decide) regard this military post called Fort Whipple as really occupied by the government for a military purpose. But there is what seems to me conclusive evidence that the government is not treating or using this reservation as a permanent acquisition of land for any purpose. Section 355 of the Revised Statutes forbids the acquisition of real estate by the Government for any permanent military purpose until a perfect legal title and cession of State jurisdiction shall first have been obtained. All reservations of military lands in the Western States are for a more or less temporary purpose. The term military reservation has come to be synonymous in that part of the Union with temporary reservation for military purposes. The requirements of section 355 are, I believe, never complied with in regard to those reservations, because they are deemed temporary properties of the government, temporarily used, and they are reserved from public domain acquired by the government by treaty as a sovereign power. The requirements of that section have not been complied with in regard to the parcel in question of the Arlington estate, embodying eight hundred and eighty-two acres. It is not now occupied by troops, and the fact that the requirements of section 355 have not been obeyed, nor the authority conferred on the President by section 1838, himself to obtain from the State a cession to the United States of its jurisdiction, has not been exercised, seems to prove that the government has and has had no real intention of occupying that property with troops.

I therefore conclude that nine hundred acres of the Arlington estate are not in actual bona fide government use, and that the only
68 practical uses to which it is devoted in fact are those enjoyed and exercised by the two hundred poor people who live on the premises.

I am not aware of any express law, and I doubt if there be any law, authorizing any officer of the Army of the United States in a time of peace to "set apart a military post and reserve in connection therewith," to be "considered as a military reservation," any considerable tract of land in the old thirteen States, where there are no "public lands," and

where the government has no actually used military post, without a previous compliance with the requirement of section 355.

In respect to this nine hundred acres, I think the pretension of the counsel for the government is unfounded, either that it is occupied by officers or agents of the government, or that it is actually used by the government for any but nominal government purposes; or that the government has title in it in its sovereign capacity, even though it should be found to have such title in its merely corporate character.

In the foregoing inquiry I have unavoidably, to some extent, overstepped the showing of the record, but I have gone into an examination of the uses made by the government of this property, more in deference to the estimate of the importance of the matter expressed by counsel for the government than from any opinion of my own that it can affect the decision of the cause. It will be seen in the end that the principles of law governing the decision apply as conclusively to the smaller portion of the estate, embracing the cemetery, as to the larger portion of the estate occupied by its miscellaneous throng of defendants.

I return to the parcel of two hundred acres set off as a national cemetery; and I cannot but regret that the title of property so hallowed in the minds of patriotic people as that now under contemplation should have been left in such doubt as to fall under the cold, inexorable scrutiny of a court of law. If sections 4870, '71, and '72 of the Revised Statutes be examined, it will be found that they contain specific directions as to the manner in which an exclusive title in the United States in lands intended as cemeteries shall be obtained, and the exclusive jurisdiction of the United States over them shall be secured. Their provisions have not been availed of in respect to the Arlington Cemetery. Nor has the requirement of section 355 been complied with, nor the authority conferred by section 1838 exercised. The title in this property is held by the United States merely as if it were an ordinary purchaser without the authority of a sovereign over it, or the prerogatives of a sovereign to protect it. The case of the cemetery tract differs from that of the reservation not at all in regard to the legal or political title, and only in the fact that it is actually used for a necessary, I will add sacred, public purpose.

In regard to the whole Arlington estate, the title of the United States is, in the condition alluded to by the chief law officer of the government, in 14 Opinions of the Attorney-Generals 200, in a letter written to the Secretary of the Treasury, instructing him, in these words:

"In regard to lands owned by the United States within the limits of a State over which the State has not parted with its jurisdiction, the United States stand in the relation of a proprietor, and the local officers have, in my opinion, the same right to enter upon such land, or into the buildings located there, and seize the personal property of individuals for non-payment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the said purpose, it being understood in the former case that the right must be so exercised as not to interfere with the operations of the general government."

The tenure by which the United States holds the Arlington estate is described by Vattel in a passage quoted by counsel of the government, wherein that writer says:

"What is called the high domain, which is nothing but the domain of the body of the nation or of the sovereign who represents it, is everywhere considered as inseparable from the sovereignty. The useful domain, or the domain confided to the rights that may belong to an indi-

vidual in the State, may be separated from the sovereignty, and nothing prevents the possibility of its belonging to a nation in places that are not under her jurisdiction. Thus may sovereigns have fiefs and other possessions in the territories of another prince. In these cases they possess them in the manner of private individuals."

It was said by Judge Story, in The United States v. Cornell, 2 Mason's Rep., p. 63:

"Although the United States may well purchase and hold lands for public purposes within the territorial limits of a State, this does not of itself oust the jurisdiction or sovereignty of such State over the land so purchased. It remains until the State has relinquished its authority over the land, either expressly or by necessary implication."

In Commonwealth v. Young, Bright. Pa. Rep., 302, it was held that

"The Constitution of the United States prescribes the only mode by which they can acquire land as a sovereign power, and therefore they hold only as an individual, when they obtain it in any other way."

To the same effect is the decision in the case of The People v. Godfrey, 17 Johns. Rep., 225.

In Renner v. Bennett, 21 Ohio, 431, decided in 1871, it was held that where the United States, without the consent of the State, purchases and uses land for any of the purposes specified in section 8, article 1, of the Federal Constitution, it acquires no jurisdiction over the land.

In the case of Commonwealth v. Young, it was held that the sale by public outcry of lands of the United States over which the State jurisdiction had not been ceded, in violation of a State law requiring that lands should be so sold by an auctioneer commissioned by the governor, was invalid.

It seems clear to me, therefore, that the government holds the Arlington estate by private and not by sovereign tenure, and that it is holding only two hundred acres of it by an officer for a necessary public purpose. Therefore I think that the pretension of counsel for the government, that it holds the whole estate for actual public purposes by the hands of its officers and by sovereign tenure, is quite inadmissable.

The government acquired this land under authority of a loose law passed in 1863, when the times were much out of joint; but it does not hold it in observance of, and compliance with, the requirements of any law upon the statute-book prescribing the manner in which its title to and authority over lands shall be secured and perfected.

I come now to consider the question whether the government can be sued directly in the manner in which it is sued in this action for real property held as just described.

I have brought to the investigation of this question an earnest solicitude to decide it aright, because, as must be known to every lawyer, on its decision the title of the government to Arlington in all probability depends. There stands in the background of this suggestion and demurrer the fact that the tax titles derived by purchasers at the tax sales made by Commissioners Hawxhurst, Watson, and Foster, have been overthrown and held void by the Supreme Court of the United States in the two cases of Bennett v. Hunter, 9 Wall., 326, and Tacey v. Irwin, 18 Wall., 549. Under these decisions as many as eighteen or twenty actions of ejectment have passed under the supervision of this court, in proceedings to which the defendants have not thought it worth while to make contest. An instance of one of these cases may be found in Lee v. Chase, 1 Hughes, 403.

Since the decision in Tracy v. Irwin no holder of land acquired from

Hawxhurst, Watson, and Foster has made defence until now; and it is known to the bar that there can no defence be made in this case except the one now under consideration, to wit, that the government is not amenable to suit in the indirect form employed in this action.

The commissioners who have been named adopted a rule not to receive the taxes due on property advertised for sale unless tendered by the owner in person. This rule was so rigidly enforced that neither friend, relation, nor agent was allowed to pay taxes due for the absent
69 owner; their application to pay and save the property from sale being uniformly refused by the commissioners under the operation of the rule in question.

In Bennett v. Hunter it was insisted, in support of the tax deed, that the right to pay the tax before sale was limited to the owner in person and could not be exercised by the tenant in possession who had offered to pay it. This position was not sustained by the court, which held that the payment of the tax which the act requires to be made by the owner need not necessarily be made by him in person. It held that it was enough if it be made by any person for him; and this on the ground that an act done by one for the benefit of another is valid if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice, and the court held the tax sale to be void.

In Tacey v. Irwin, where there had been no tender of tax by the owner or other person, the court said:

"It is difficult to see how, upon the case as found here, the sale can be sustained. The law does not require the doing of a nugatory act, as would have been a formal tender of payment, after the action of the commissioners declining to receive the taxes from any person in behalf of the owner. Bennett v. Hunter decides that the owner has the right to pay either in person or through any one not disavowed by him who was willing to act for him. This right the commissioners, by the rule which they established and the uniform practice under it, effectually denied. The friends and agents of absent owners were informed that it was useless to interpose in their behalf, and unless the owner appeared in person and discharged the tax the property would be sold.

"This was equivalent to saying that a regular tender by any other person would be refused. While the law gave the owner the privilege of paying by the hands of another, the commissioners confined the privilege to a payment by the owner himself. This was wrong, and a denial of the opportunity to pay accorded to the owner by the act; and the lands were therefore not delinquent when they were sold.

"If an offer in a particular case, to pay the tax before sale, and refused by the commissioner because not made by the owner in person, rendered a subsequent sale by the commissioners void, surely a general rule announced by the commissioners that in all cases such an offer would be refused must produce the same effect.

"Such a rule of necessity dispenses with a regular tender in any case. In the absence of any proof to the contrary, it is a legal presumption that the tax in this case, though not actually offered, would have been offered and paid before sale but for the known refusal of the commissioners to accept any offer when not made by the owner in person.

"If so, the commissioners were not authorized to make the sale in controversy, and the judgment must be affirmed."

It is plain, therefore, in the light of these decisions of the Supreme Court of the United States, that the tenure of the Government in the Arlington estate depends upon the success of its present endeavor to

ernment directly and suits against its property"—an expression the judicial import of which will appear in the sequel.

Before going further in this line of inquiry let us examine the nature of an admiralty proceeding. Any one having a claim by maritime contract against a vessel afloat may file a libel (a little book) in a maritime court within whose jurisdiction the vessel may be, setting out his claim and praying for her arrest. Thereupon issues process in rem, that is to say against the thing, the vessel by her name, the "Mayflower," for instance; which under this process is seized and brought into the custody of the court; and the owner of the vessel is then allowed a day to answer.

The res, or vessel, being thus in judicial custody, all other persons having claim against the vessel by maritime contract are allowed to come in by libel or petition and submit them to the judgment of the court. And by our law under the 43d rule in admiralty any person who may have an interest in the proceeds of the sale of the seized vessel, whether by maritime or other contract, may come in with like purpose. Thus it is apparent that a proceeding in admiralty presents the scene of a group of suits; of suits in rem; suits against the thing, the vessel; in which suits the owner is indirectly defendant, and the several libellants and petitioners are independant and distinct actors or plaintiffs. Accordingly, if the Government of the United States be the owner of the libelled vessel, as it was in the case of the "Siren," the government is indirectly sued, not only by one plaintiff but possibly by half a dozen plaintiffs.

In the "Siren" case it had been decided by a United States district court that there could be no intervention by petition or libel as against property belonging to the government; but, as before stated, it was there held by the Supreme Court that such suit would lie, and decree was given in favor of the claimant for damages sustained by the collision.

It will not do, therefore, in this case, where the government was sued indirectly, and where its property was the direct subject of judicial proceeding, to quote any expression employed by the court as authority against the very jurisdiction which the court was in the act of exercising.

Previously to this case, that is to say, in 1865, had been decided the leading case of The Light Boats by the supreme court of Massachusetts, 11 Allen, 157. That was, of course, not an admiralty suit. It was a statutory proceeding, very similar in character to an admiralty suit, taken to enforce by attachment in rem a mechanic's lien given by the State law. Certain boats, intended to be used for floating lights on the Potomac during the civil war, had been built for the United States at New Bedford, Mass., by contract; the contractor had received the price, and they had been delivered to the government, and were in the custody of the officers of the United States, with crew and provision on board, awaiting their armament, but they were still at the builder's wharf. It was while thus conditioned and in custody of the government that they were seized on attachment by a State officer.

The petition alleged that the United States were the owners of the vessels, and prayed that notice should issue to the United States "that they may appear and answer thereto." The vessels were the lawful property of the United States, had been fully paid for, and were in their actual custody by voluntary delivery.

After an exhaustive review of all the then existing authorities on the subject, the court held that "after the vessel had once come into the

possession of the United States for public purposes they were subject to the exclusive control of the executive government of the United States, and could not be interfered with by State process, and it gave judgment against the attaching petitioners."

But the court prefaced this judgment with the following remarks:

"The petitioners suffered the title to pass, and the possession to be delivered to the United States before they took one step in the State courts to establish their lien. If they had filed thier petitions and attached the vessels before they came into the possession of the United States, they might well have contended that the courts of the commonwealth had acquired a jurisdiction of the case, which could not be divested until the object of the suits was accomplished. This process does not wait for final adjudication of the rights of the parties before it takes the property out of the hands of its owner and possessor, but assumes the custody at the very first stages of the proceeding."

This latter language was used by the court after having stated that the contractor had been paid by the government by installments the contract price of the vessels as the work progressed, and had been fully paid before the attachment had been levied. The language which it employed was used, therefore, in respect to property wholly owned by the government.

The result of this decision is that though government property may be seized under mesne process of the court before it comes into the government custody, yet it cannot afterwards be thus dealt with when the process of the court originating the suit would wrest the property from the possession of the government's officers. To the same effect was the decision of Judge Shipman in the case of the steam-propeller Thomas A. Scott, 10, English Law Times (N. S.), 726, a public armed vessel libelled during the war.

There are many cases in which it has been held that libels in admiralty, or attachments in rem on mesne process, will not lie against property owned by the government, and we are driven to ascertain the principle which discriminates cases in which the proceeding will lie from those in which it will not lie. That principle is distinctly set forth in the case of the schooner "Davis," 10 Wall., 20, a case which is the more important from the fact that the opinion of the Supreme Court was delivered by Mr. Justice Miller, from its having been rendered on appeal from a decree of Mr. District Judge Shipman, who, I believe, had never before been reversed, and from its having been rendered after the decision of the supreme court of Massachusetts in the leading case of The Light Boats, to which I have already alluded.

Let it be borne in mind that a proceeding in rem in admiralty courts, or by attachment in other courts, is commenced by the seizure of the property into the custody of the court; and that execution is virtually had on mesne process at the beginning of the suit.

The principle decided in the case of "The Davis" was this: that an admiralty court may enforce a lien in a proceeding in rem against the personal property of the United States in any case where the marshal in executing mesne process does not interfere with any officer or
71 agent of the United States; does not destroy the possession of the United States; does not by putting the government out of possession reduce it to the necessity of becoming plaintiff or actor in court to assert its claim to the property.

The government had shipped in 1865 a quantity of cotton from Savannah to its agent in New York on the schooner "Davis." During its voyage the vessel and its cargo fell into the perils of the sea, and

were saved from destruction by salvors, so that afterwards she came safely into her port of destination. The cotton (as well as the vessel) was at once regularly libelled by the salvors, as is usual in such cases, and was seized by the marshal of thecourt, of course on mesne process.

It was objected in the admiralty court that this was in fact a proceeding indirectly against the government, the cotton being undeniably the property of the government. Mr. District Judge Shipman held in the admiralty court that the master of the schooner was as to the cotton the agent of the government, and that the marshal's seizure of it was a dispossession of the government, and that therefore the libel could not lie as to the cotton. But the Supreme Court of the United States held otherwise. It held that the master of the schooner was a common carrier, and not a mere agent of the government, and that a seizure of the cotton while in his custody was not a dispossession of the government. It held that though this was an indirect suit against the government, yet the court might properly proceed to adjudicate upon the lien of the salvors and to decree out of the proceeds of the sale of the vessel the amount due them. Mr. Justice Miller, in delivering the opinion of the court, makes the following observations, in which it will be seen that he explains the sentence which we have quoted from the decision in the case of The Siren. He says:

"Perhaps the most authoritative and well-considered cases on this subject are The Siren and Briggs v. The Light Boats. Both of these decisions assert the doctrine, after full review of the authorities, that such a lien cannot be enforced where, in order to do this successfully, it is necessary to bring suit against the United States, because the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process without some act of Congress expressly authorizing it to be done.

"They also both assert the proposition that no suit in rem can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court.

"There are some expressions in the opinion of this court in the case of The Siren which seem to imply that no suit in rem can be instituted against the property of the United States under any circumstances. But a critical examination of the case and the reasoning of the court will show that that question was not involved in the suit, and that it was not intended to assert such a proposition without qualification. * * * * The learned judge who delivered the opinion cites with approval the case of The Light Boats, 11 Allen, in which the doctrine is laid down and well supported that proceedings in rem to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court. With the principle as thus stated we agree, and do not see in it anything inconsistent with the case of The Siren.

We have here a clear elimination of the principle of which we are in search. The learned judge did not qualify his language by confining his meaning to mesne process; but he was speaking of admiralty process, and could have meant no other than mesne process.

The cases of The Light Boats and of The Davis have the greater significance, because they carry the liberty of indirectly suing the Government farther than does the admiralty court of England. Without going into a review of the English cases, I will state the result of such

a review in the language employed by Judge Shipman in the case of The Davis (when it was before him) that in no case has the English court of admiralty attempted to deal adversely with the public property of the sovereign, except where there has been a voluntary appearance on its behalf and submission of the case to the judgment of the court. Yet it is to be observed that England is noted for the absolute and unquestioning deference and subjection to law which characterizes her people and public officers in every department of society, and that the officers of the admiralty would not dare so to outrage public sentiment as to refuse to submit a right or claim of the government to the judgment of a proper court.

I will now pass from the review of those suits concerning personal property, which are commenced by a seizure of the res in contest, to those which are commenced by the service of the ordinary mandatory process of the courts.

The leading case in this class is the great one of Osborn v. The Bank of the United States, 9 Wheaton, 738. We have to do with this case only in its relation to the question whether a sovereign power may be indirectly sued.

A tax of some $100,000 had been assessed under a law of Ohio upon the branch Bank of the United States. A bill of injunction was filed in the circuit court of the United States, in apprehension of a levy for the tax, praying that the auditor of the State, Osborn, might be enjoined from demanding or receiving the amount of the tax. The order of injunction was granted and served on one J. S. Harper, a State collector, "while on his way to Columbus with the money and funds on which the injunction was to operate," and on Osborn before Harper reached Columbus. The amount in the hands of Harper was $98,000. This money was delivered by Harper to the State treasurer, and by him entered on his books to the credit of the State. Its identity was preserved by its being kept in a separate package. It went afterwards into the custody of a committee of the State legislature, and was by it returned into the State treasury, where it remained during the pendency of the suit.

Here was property claimed by the State as collected under a tax law, in the custody of its tax collector at the commencement of the suit, and in its possession, as its owner by prima facie right by deposit in its treasury and standing to its credit on its treasurer's books.

The suit was brought against Osborn, the auditor, and amended to embrace Hooper, the collector, and Curry, the treasurer. It would not be possible to find a case where a State could be more positively sued in indirect form than was the State of Ohio in this case. It was only in the single particular that the State was not a nominal party to the record, that she was not the defendant sued.

The Supreme Court ruled that this suit thus brought and maintained was one of which the United States court had jurisdiction.

In an earnest and elaborate decision, Chief Justice Marshall made use of the following language:

"In cases where a State is a party on the record the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause inquiring into and deciding on the extent of a State's interest without having a right to

exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction? * * *

"The judicial power of the Union is also extended to controversies between citizens of different States, and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties in the record? In a suit, for example, brought by or against one as executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that if the executor be a resident of another State, the jurisdiction of the Federal courts could be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why then is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends not upon this interest but upon the actual party on the record."

In United States Bank v. Planters' Bank, 9 Wheat., 904, where a State was shareholder in the bank and was indirectly party defendant, Chief Justice Marshall said it was "a sound principle that
72 when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen;" and in Briscoe v. The Bank of the Commonwealth, 11 Peters, 257, where the State of Kentucky was the exclusive stockholder of a bank, and was the exclusive party sued, though sued nominally as a corporation, Mr. Justice McLean held that the State imparted none of its elements of sovereignty to the bank in creating it, and that the funds and property of the bank might be reached by the legal or equitable process of a court of justice.

In Davis v. Gray, 16 Wall., 203, which was a Texas railroad case, the court said (Mr. Justice Swayne): In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest."

The case of Swasey v. North Carolina Railroad Company, 1st Hughes, 17, was one of the same character. There certain property of the State, in the form of railroad shares, was the subject of litigation, and I shall let Chief Justice Waite, who rendered the decision, state the objection to it and his answer:

"It is insisted by the defendant that the State of North Carolina is in fact a party defendant, and consequently that this court cannot entertain jurisdiction of the cause.

"The State, although directly interested in the subject matter of the litigation, is not a party to the record. The eleventh amendment to the Constitution of the United States provides that no suit can be prosecuted in this court against a State by the citizens of another State, or by citizens or subjects of a foreign state. It has long been held, however, that this amendment applies only to suits in which a State is a party to the record, and not to those in which it has an interest merely.

"It is next urged that if the State is not actually a party to the suit, it is a necessary party in whose absence the cause cannot proceed, and that as a State cannot be brought into court, no relief should be granted upon the case made.

"If the State could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of Osborn v. The Bank of the United States, 9 Wheaton, 738, it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents, without making the State a party, when the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent. The real question therefore to be determined is, whether the court has jurisdiction of the property which it is sought to charge, or of the agent having it in possession."

I will here point out the fact that the court maintained its jurisdiction in and heard and determined each of the suits of Osborn v. U. S. Bank, and Swasey v. North Carolina Railroad Company (to say nothing of the other intermediate suits) notwithstanding that the effect o f final process of execution would be, in one case, to evade the treasury of a State and to take from the hands of its officer property (money claimed by the State as public property, and, in the other case, to invade the office of a corporation acting as agent of the State for the purpose of a compulsory transfer and sale of the State's shares in its capital stock. I point out the fact in this case only for the purpose of showing passim that the "process" contemplated by Mr. Justice Miller, in his opinion in the case of "The Davis," was only mesne process.

And now I deduce this principle as the teaching of the leading cases which have just been reviewed, viz: That government may be sued indirectly in regard to personal property in actions not attended by a seizure of the property out of its officers' possession on mesne process; even though in executing judgment on final process, such seizure and dispossession would result.

If a court of justice, after a full hearing, decides that personal property claimed by government by title on which it has judicially passed belongs to another, it will not presume that government will fail to deliver it to the rightful owner; and it is believed that in this country, as in England, final process for restitution would never be necessary. At all events a court will not be deterred from adjudicating such a cause by the presumption that the government will not make restitution without the indecent interposition of the court's writ of execution.

But suits to test the title to property, manifestly, differ from those brought to recover a pecuniary debt; and it is conceded that no court but the Court of Claims has jurisdiction to render what Mr. Justice Miller calls "a moneyed judgment" against the United States. Case v. Terrill, 11 Wallace, 199. Counsel for the government speak of the impatience with which the Supreme Court expressed itself of the decree which the court below, the United States circuit court for Louisiana, had rendered against the United States in this last case. The cause of the judicial impatience was, that a court should have rendered a judgment "against any one not made a party to the suit and who had in no manner," direct or indirect, "appeared in the case." Here a moneyed judgment for more than $200,000 had been rendered against the United States though not a party, direct or indirect, to the proceedings.

But even where money is the subject of judicial proceeding, it is held that a court may proceed to the point of determining what amount is

due against the government, without regard to the fact that the power to award execution be not within its jurisdiction. United States v. Bank of Metropolis, 15 Pet., 377; De Groot v. United States, 5 Wall., 419; United States v. Eckford, 6 Wall., 484; and many other cases. In a case, for instance, where government is plaintiff, and a set-off proved against it exceeds its own demand, the judgment is only that the defendant go without day; Reeside v. Walker, 11 Howard, 290; and "this for the reason that no officer in a republic, however high, not even the President of the United States, much less a Secretary of the Treasury, or treasurer, is generally empowered to pay debts of the United States when presented to them."

Suits for money debts of government stand on a different footing from suits respecting specific personal property claimed by government; but I repeat that although a moneyed judgment cannot be rendered against the government, except when authorized by law, the mere fact that it cannot be does not of itself suffice to defeat the jurisdiction of a court to ascertain what is due the citizen.

This examination into decisions of the courts could be pursued until research degenerated into pedantry, and it is confidently believed that the result of a discriminating and candid reading of them all would be precisely that derived from the leading cases already cited, viz: that courts of justice may take cognizance of actions affecting the personal property of the government of a sovereign power, wherever the service of mesne process before adjudication does not involve the seizure of the property out of the hands of its officers, even though the proceeding looks to a judgment, final execution upon which, if issued, would dispossess the government.

Before passing on to cases involving real property, I will mention the case of Cohens v. Virginia, 6 Wheat., 264. There, I believe, for the first time, arose the question, whether a State having prevailed below, in a suit in which she was prosecutor by indictment, she might be made defendant to an appellate proceeding for carrying the case up to the Supreme Court of the United States in spite of amendment eleven of the Federal Constitution forbidding suits against the States. It is hardly worth while to state that the proceeding was sustained by the Supreme Court.

I think now the way is cleared for an examination of the decisions which bear upon the precise question which we have in hand, viz, whether the statutory action of "ejectment," which is used in this instance in lieu of the English writ of right, lies to test the title in lands claimed by the United States, all of which the government has in possession, and part of which at least it has in actual use for a necessary public purpose.

The chief reliance of counsel for the government in denying such jurisdiction was upon English authorities; but it is useless to say more than I have done in demonstration of the fact that no authorities indicating the state of the law in England on the question whether ejectment will lie to recover lands held by the Crown have any application to the present case. This is only in statutory name an action of ejectment, being really in technical effect a writ of right. It was not necessary in installing this suit to make entry on lands held by the sovereign power, as it would be in England under the old practice. There was no intrusion, actual or fictitious, on the sovereign tenure in the incipiency of the action; and the possession of the government re-
73 mains as free from actual disturbance, and its dignity from ac-

tual or intentional insult, as if there were no suit pending at all to test its right to hold these premises.

There is no doubt of the fact that in England ejectment will not lie to recover lands in possession of the crown. There are technical reasons for this fact which, though once founded in reason, are no longer so; and there are real reasons. One of the technical reasons is that the possession of the crown, however wrongful, is exempt from intrusion by the entry and disseisin which were deemed necessary to the commencement of ejectment. Another is that since Edward I., or, at least, since James I. (Allen's Royal Prerogative, 93), the practice established by the courts has required another remedy to be pursued, viz, the petition of right. So that now in England the action of debt will no more lie where detinue ought to be brought than ejectment where the practice required the petition of right.

The temper of the English law, as well as the spirit of the English constitution, requires that suits against the sovereign shall be in precatory rather than in mandatory form. But while the law and the constitution are thus far in accord, it must be confessed that there is a wide difference between the ideal king of the English lawyers, who is above law, and the real king of the British constitution, who is subject to law. He is represented in the law-books as an absolute sovereign, as, indeed, a supernatural being who never dies; who is present at one and the same time in every court of his dominions; who can neither do wrong nor imagine evil; and who is incapable of any act of impropriety, folly, or weakness. In contemplation of the lawyers, the king is not only everywhere in the courts, but at the same time commands the army and navy; bestows all honors and titles; represents the majesty of the whole community at large; conducts all correspondence and negotiations abroad; makes peace or war; and binds the kingdom by contract or treaty. In their minds he is a corporation sole; he is an artificial person that never dies; he cannot be summoned before either an ecclesiastical or secular court; he cannot commit treason or felony; and cannot suffer punishment or corruption of blood, nor be imprisoned nor outlawed. While such is the king recognized by those of us who have studied the English law-books, those who have also studied the English history know that the sovereign of the constitution is a very different character, of whom it is watchful and jealous, whom it often denounces, frequently prosecutes, sometimes deposes, and occasionally beheads.

Of such a king as that of the English lawyers we have known nothing in America for one hundred years; and it is simply idle to cite, in American courts, precedents and authorities from English courts, which, after all, merely lay down the principle that suits against the crown must, for a thousand reasons founded in English sentiment, be in precatory and not in mandatory form. Nothing is more true than that in England, for reasons which have no existence or countenance in America, ejectment will not lie for lands in possession of the crown. And it is also in modern times the case, although it was not formerly so, that the writ of right which is not originated by entry but is commenced by mere precipe will not lie. The single sufficient reason why neither ejectment nor writ of right will lie is that a petition of right has become, in modern practice, the proper remedy in England for demands against the sovereign. See Sadler's case, 4 Coke, 55, a; The Bankers, 14 How. State Trials, 28; Attor'y Gen. v. Hallett, 15 Mees. and Wels., 106; Legh v. Roe, 8 Meeson and Wels., 579; Hovendon v. Lord Annesley, 2 Schoales and Lefroy, 617; 1 Anstruther, 215.

The nature of this proceeding is nowhere more succinctly and fully explained than in 4 Minor's Institutes, 667, as follows: "This is a proceeding in chancery, originating at common law, it is said, under the auspices of Edward I., used where the king is in full possession of any hereditament or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself, in which case he must be careful to state truly the whole title of the crown; otherwise the petition shall abate; and then, upon this answer being endorsed on the petition of the king, soit droit fait al partie (let right be done to the party) a commission issues to enquire of the truth of this suggestion; after the return of which the king's attorney is at liberty to plead in bar or to demur, and the merits are then determined as in suits between subject and subject. And if the right be determined against the crown, the judgment is quod manus domini regis amoveantur et possessio restituatur petenti salvo jure domini regis; whereby the crown is instantly out of possession without the necessity for the indecent interposition of its own officers." 3 Bl. Com., 256-7; Bac. Abi. Prerog. (E); 1 Th. Co. Litt., 305 and seq., and notes (N) and (O); Baron de Bode's Case, 8 Ad. and El. N. S. (55 E. C. L.), 208; where the mode of proceeding is stated.

In the case of the Baron de Bode it will be seen that the court exhibited a disposition to enlarge and extend the scope of the petition of right rather than to narrow it.

The truth is that all the learning which is cited from the English reporters showing that other remedies will not lie against the sovereign, and that petition of right must be resorted to, at the same time shows that the sovereign may be and is habitually sued in England in the form prescribed by English practice; so that it may be said to the glory of England that the words of John Selden and of the elder Pitt, which have been quoted, are true.

In that country, probably more than any other pervaded with the spirit of obedience to law, fidelity to contracts, and reverence for the tribunals and instrumentalities of justice, there is a remedy open for every grievance. Non recedant quærentes in curia regis sine remedio. All that the injured person is required to look to is that he seek his remedy, be it against the king or a private person, at the proper source; his remedy against the king being as open and free to him as against any other person.

Mr. Broom, in his note to The Banker's Case (Constitutional Law, p. 241), has this full and lucid explanation on the subject of remedies in England:

"The crown submits, as is abundantly proved by the cases already cited, to have its prerogatives openly discussed and investigated in courts of justice, and allows a remedy against itself for any infringement of the subject's right, provided such remedy be sought for where it can be had. 'The constitution of England,' as remarked by Lord Holt, 14 St. Tr., 784, 'has wisely distributed to several courts the determination of proper causes, but has left no subject in any case where he is injured without his adequate remedy, if he will go to the right place for it.' If a man will seek for a remedy at common law for a legacy, it is his own fault if he do not recover, as it would be if he should begin a suit for land in the court of admiralty, or go for equity to the common pleas.' And so, if the subject has cause of complaint against the crown, he must proceed for redress by that pathway which the constitution has laid down for him. For an illegal invasion of his liberty he should proceed by habeas corpus; to obtain the revocation of a grant which in-

juriously affects him he should proceed by scire facias; for an illegal invasion of the rights of property he should proceed by petition of right; speaking of which latter remedy Sir W. Blackstone (3 Com., 255) tells us that the law has thus furnished the subject with a 'decent and respectful' mode of informing the king of a grievance, and soliciting redress. This mode of procedure is appropriate for inducing restitution by the crown of land or chattel property of which it has through misinformation or inadvertence wrongfully possessed itself."

It is apparent from these authorities that the crown in England may be sued, and that the petition of right is the remedy supplied by the English law for an aggrieved subject, by which he may have his claim against the crown judicially determined. I do not think, therefore, that the practice or the legal authorities in England can with
74 any reason be adduced in support of the attitude held by the government in this cause.

Nor is the view of counsel for government correct that the petition to Congress here is the equivalent of the petition of right in England, for the petition to Congress is a political remedy, whereas the petition of right is strictly judicial. The only equivalent here of the petition of right is the right given by statute to sue in the Court of Claims, a grant, however, which does not extend to such a claim as that of the plaintiff in the present action.

Yet, I will venture the opinion that the clause of the fifth amendment to the Constitution, which forbids the taking of private property for public uses without just compensation, proprio vigore gives jurisdiction to the courts of suits brought directly against the government for the recovery of property, where the complaint avers that the proverty was taken without just compensation.

For the present case, and those of its class, there is no jurisdiction specially derived from the express legislation of Congress, just as there is probably no express law of Congress authorizing by name the action of debt or trespass on the case; and this being an inferior court, we must needs look to the decisions of the Supreme Court of the United States for that judicial legislation which supplies in the present instance the only chart by which we may direct our course.

I come, therefore, in conclusion, to consider those cases decided by the Supreme Court of the United States in which the government of a State or of the United States has been indirectly sued in respect to lands in its possession, whether held or not for public purposes.

The leading case on the subject, and the first in point of time, is that of Meigs et al. v. McClung's lessee, 9 Cranch, 11. The land in dispute was occupied by the United States as a military garrison. In a treaty settling the boundary of the territory of the Indians, and extinguishing their title to the rest, in the now State of Tennessee, the government had reserved a right to put a garrison on the Indian portion, and to use a reserve of three miles square in connection with it, but it happened that the Indian land did not extend above the mouth of the Highwassee River, and the government was unfortunate enough, through a mistake, to put its garrison above the mouth of the river, on private property, and not below the river, on Indian ground.

An action of ejectment was brought and the process was served on Meigs, the military officer of the United States in command at the garrison. The cause proceeded to judgment in the Federal court below, and went up on writ of error to the Supreme Court of the United States. The cause was there heard, and Chief Justice Marshall delivered the unanimous opinion of the court in these words:

"This court is unanimously and clearly of opinion that the circuit court committed no error in instructing the jury that the Indian title was extinguished in the land of controversy, and that the plaintiff below might sustain his action."

Though it was "objected and insisted that the action could not be maintained against them, because the land was occupied by the United States troops and the defendants, as officers of the United States for the benefit of the United States and by their direction," yet it does not appear from Mr. Cranch's report of the case that the question of jurisdiction was raised by plea in the court below. That point does not seem to have been relied upon by the government as a ground of error in the argument above. And so the counsel for the government in the present case, with that extraordinary and commendable diligence and alacrity which has characterized them throughout its progress, object that as an appellate court does not consider any grounds of error but such as are relied upon in the record brought up to it, so the Supreme Court could not have considered this question of jurisdiction in the case of Meigs v. McClung's lessee. They cite Montgomery v. Hernandez, 12 Wheat., 130; Murdoch v. Memphis, 20 Wall., 590; Venden v. Coleman, 1 Black., 472; Webster v. Cooper, 10 Howard, 54; Brown v. Huger, 21 How., 305. But it seems to me that the question of jurisdiction is one which does not fall within the rule stated by counsel, or within the reason of the rule, and that the court below and the Supreme Court could not but have considered that question in the case under consideration. Whether or not the court had jurisdiction to try the title of the United States in property held as a garrison by officers and visible troops of the Army, for a bona fide patent, necessary public purpose, was, it seems to me, of the very essence of the case before the Supreme Court; and the language employed by the court in rendering its decision, that "the plaintiff below might sustain his action," seems to imply that, whether the question of jurisdiction, which the consent of counsel cannot affect, was technically before it or not, it was distinctly and expressly passed upon by it. Here the judgment was against the government.

Another case of ejectment, to recover Fort Dearborn, at Chicago, a possession of the government, occupied by its Army officers for the purpose of a military station, was that of Wilcox v. Jackson, 13 Pet., 498. The action was brought in a State court, and was proceeded in there to judgment. 1 Scammon (Ill.), 344. It was taken by writ of error to the Supreme Court of the United States, and that court heard the cause and proceeded to judgment upon it.

In that case the decision of the State court against the government was reversed, and a judgment for the government given by the Supreme Court. The judgment in each forum was upon the merits, and not upon the question of jurisdiction. The State court took jurisdiction upon the merits, and the Supreme Court reversed the State court upon the merits, taking no notice of the question of jurisdiction. Counsel for government in the present case admit that the Supreme Court in that case, "in deciding upon the law of the case, decided the question of jurisdiction;" though they think that, as it was decided upon agreed facts, the question of jurisdiction was virtually waived. But can a merely implied consent give jurisdiction in such a case? Consent of counsel does not give jurisdiction where jurisdiction is of the essence of the proceeding. Mordecai v. Lindsay, 19 How., 199; Montgomery v. Anderson, 21 How., 386; and Ballance v. Forsyth, 21 How., 389.

In the case of Grisar v. McDowell, 6 Wall., 263, the plaintiff claimed as seized in fee the presidio of the old pueblo of San Francisco, then

occupied by the United States, and brought his action indirectly against the United States, who set up that the property was public property of the United States, reserved for military purposes. The defendant named was General McDowell, commanding the military post, and process was served on him. The circuit court entertained jurisdiction of the cause, and proceeded in it to judgment. It was thence carried to the Supreme Court of the United States, which proceeded in it to judgment. The report does not show that in either court the question of jurisdiction was expressly raised. But certainly they could not have considered that the mere fact of possession by the United States and use of the property for public purposes was sufficient to defeat their jurisdiction. They looked narrowly and diligently into the grounds of the title of the plaintiff and of the United States, and they each decided the case, on the relative strength of the two titles, in favor of the United States. The fact that the property was claimed by the United States, was in the possession of its officers, and in its actual necessary use for military purposes intruded itself into the cause at every stage; and neither court deemed this fact sufficient to defeat its jurisdiction, and each proceeded to consider and decide the case on its merits.

I come now to the latest case which has been decided in the Supreme Court of the United States in which the question now before this court was brought under review. Thus was the case of Cooley v. O'Connor, 12 Wallace, 391. The action was ejectment. It was brought
75 to recover a lot of ground in the town of Beaufort, South Carolina, owned by the United States. Process or notice of ejectment was served on the occupants, who were tenants of the United States. It was a case in which the United States was sued indirectly, in ejectment, for property claimed by government. The claim, as in the case now at bar, was founded on a tax title obtained at a sale made durante bello by direct-tax commissioners of the United States for delinquent taxes. The action of ejectment brought was the old one of trespass quare clausam fregit, with endorsement that "the action was brought to try a title as well as for damages." It was the equivalent of Blackstone's English action ejectio firmæ. It was a case to which the English authorities cited by counsel for government apply directly, and with which the English cases which they rely upon run on all fours. The government was using the lot of ground sued for for public purposes, virtually as it is using the 882 acres of Arlington, those purposes being rather imaginary than real. The defendants were one Cooley, one Judd, and others; Cooley was the tenant of a government lessee, and Judd a clerk of the United States for some purpose or other.

From the bill of exceptions of the defendants the following is an extract:

"8. And the defendants, to maintain and prove the issue on their part, gave in evidence tending to show that Samuel A. Cooley was in possession of a portion of the premises in the plaintiff's declaration mentioned, a tenant of George Holmes, who had leased said portion of said premises from the United States direct-tax commissioners at Beauford, South Carolina; that as such tenant he went into possession in June, 1867, and continued therein until the first of December, 1868; that the said Henry G. Judd occupied a portion of said premises in the plaintiff's declaration mentioned as clerk of the United States direct-tax commissioners at Beaufort, and by their permission and direction; that he was in possession of said premises from or about the first of June, 1867, until about the first day of December, 1868; that said Cooley and Judd, defendents, had no other right, title, or interest in

said premises except as hereinbefore set forth, being mere tenants at will, in possession, and that they derived their right to possession from the United States direct-tax commissioners at Beaufort, South Carolina, who acted and assumed to act for and on behalf of the United States of America."

Of this cause the circuit court below took jurisdiction, heard it on the merits, and proceeded to judgment. When carried up, the Supreme Court did the same. The government had lost the case in the circuit court on an instruction to the jury. The Supreme Court found error in the instruction, and what did it do? Did it reverse the judgment below and order the lower court to dismiss for the reason that the United States was the only defendant in interest? It did not. Its order, as reported, was "judgment reversed and venire de novo awarded."

Is it possible, in the light of these cases, to hold that the fact of the Federal Government being claimant by record title of property which is made the subject of an indirect suit against it, in possession of the property, and in the actual use of it for public purposes, defeats the jurisdiction of the court to look into the grounds of its title and decide the action upon its merits?

These decisions bind me imperatively. Sitting here, in an inferior court, I am not at liberty to hold otherwise than the Supreme Court has done. To do so would be presumptuously to overrule the Supreme Court in all the four cases of Meigs v. McClung, Wilcox v. Jackson, Grisar v. McDowell, and Cooley v. O'Connor.

These decisions of the Supreme Court are supported by several cases decided in other courts of the highest authority. Mr. Justice Grier had held the same view as to the jurisdiction of a court in Elliott v. Van Voorst, 3 Wall., jr., 301. In that case the Government of the United States, by some accident of business, had become the owner of the equity of redemption in some land in New Jersey, and a proceeding had been taken by the mortgagee to foreclose his mortgage. It was necessary under the rules governing chancery courts to give notice of the proceeding to the United States, standing virtually in the shoes of the mortgagor; and Mr. Justice Grier, sitting in circuit court, held that, quoad hoc, the United States held as a private person, not as a sovereign, and might be served with notice of the proceeding just as any private mortgagor or holder of his equity of redemption might be served.

In Dreux et al. v. Kennedy et al., 12 Lou., 489, decided in 1846, plaintiffs sued the defendants to recover lands in Louisiana alleged to be in their possession. The latter prayed for a dismissal, averring that the property was in the possession of the United States, a branch mint having been erected thereon; that they were merely officers of the mint and not in possession of the premises, and had no authority to represent the United States. But it was held that the exception be overruled, the court saying where the party in possession of land when sued for it points out the owner under whom he holds he is bound to defend the action if such owner do not live within the State or is not represented therein, or if such proprietor, lessor, or principal be the United States, against whom no direct action can be brought.

In the case of French v. Bankhead, 13 Gratt., 183, which was an action of ejectment brought against the military officer in command at Fortress Monroe, Virginia, for the recovery of land of which the United States claimed to be owner, and occupied by him as such officer, and where the defendant was represented in the supreme court of appeals of Virginia (the action having been brought in the State court, and

never removed to the Federal court) by counsel, one of whom (Joynes) was at the time United States district attorney, and where it was decided in favor of the defendant, upon the ground that the United States was entitled to the property in controversy, no objection to jurisdiction was made at any stage of the case.

In Polack v. Mansfield, 44 Cal., 36, decided in 1872, after deciding that a mere servant or employé who does not claim any interest in the premises nor any right to their possession, and only in that manner occupies the premises, cannot be sued in an action to recover lands, the court goes on further to decide:

"That the rule which thus exempts the mere servant or employé of another from an action presupposes that the employer may be sued, and that the wrongs of which the plaintiff complains may be redressed by resort to an action against the employer, as being the real party committing the ouster. In a case, therefore, where the employer is for any reason not amenable to an action, the rule referred to has no application, and the employé or servant becomes ex necessitate the proper party defendant, since he is the only party who can be subjected to a suit at all. Were this otherwise it would result that open and admitted violations of private rights would find no redress in the courts of the country. The Government of the United States as such cannot be sued as a party defendant in the courts of the State; and unless its servants and employés may be properly held responsible for the lawless invasion of private property committed by them on the command of the government, the citizen is left wholly without the protection which it is the first aim and purpose of municipal law to defend."

There is but one other and very unimportant part of the case to deal with, and that is the intimation that, in the event of the plaintiff's recovering in this action, the court would have no power to make good its judgment by final process.

That is a matter that must take care of itself. Mr. Justice Blair, in Chisholm v. Georgia, 2 Dallas, 451, after alluding to this argument ab inutile, and speaking of the jurisdiction of the court being questionable, on the ground that Congress had not provided any form of execution or pointed out any mode of making a judgment against a State effectual, said: "Let us go on as far as we can, and if at the end of the business, notwithstanding the powers given us in the fourteenth
76 section of the judicial act, we meet difficulties insurmountable to us, we must leave it to those departments of the government which have higher powers, to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation that a State may have other motives than such as arise from the apprehension of coercion to carry into execution a judgment of the Supreme Court of the United States, though not conformable to its own ideas of justice."

To the same effect were the words of Mr. Justice Grier in the case of Elliot v. Van Voorst, where, in meeting the objection that there was no precedent to be found for his assuming jurisdiction of a cause judgment in which the process of the court might be inadequate to enforce, with that practical wisdom and downrightedness of speech which characterized him, he said: "It is time there was one."

Is it possible, in the light of these cases, to hold that the fact of the Federal Government being claimant by record title of property which is made the subject of an indirect suit against it, in possession of the property, and in the actual use of it for public purposes, defeats the jurisdiction of a court to look into the grounds of its title and decide the action upon the merits?

Sitting here, in an inferior court, I am not at liberty so to hold, because to do so would be to overrule the Supreme Court in all the four cases of Meigs v. McClung, Wilcox v. Jackson, Grisar v. McDowell, and Cooley v. O'Conner.

I have found it impracticable to make mention of each of the multitude of authorities which were cited in the argument of the cause. I have, however, examined them all, and think that I have adopted the teaching of most of them and done violence to that of none.

In the fact that the case at bar is the only one yet arising in which this especial question of jurisdiction has been raised at the outset of proceedings, and in which the fate of the government's title has seemed to depend wholly upon this question, the present is a case of first impression.

It is not to be denied that this cause is before the court in a form not heretofore known to American precedent; that is to say, it presents a case in which the sovereignity sued comes into court, in the first incipiency of the proceeding, deigning to protest its exemption from amenability to the action, but disdaining to submit itself, as may have been done in the cases last cited, to the jurisdiction of the court.

A case of such consequence will naturally ascend from this forum to the lofty and most profoundly revered tribunal of ultimate resort provided by the Constitution of the United States.

With firm judicial confidence, I sustain the demurrer of the plaintiff in this cause, and direct that it shall proceed to trial on the merits. If, then, it shall go up to the Supreme Court, as I doubt not it will do, I shall console myself with the memorable reflection of Lord Nottingham in the case of the Duke of Norfolk: "I am not ashamed to have made this decision, nor will I be wounded if it should be reversed."

W. J. Robertson, Legh R. Page, and Francis L. Smith, for the plaintiff: U. S. attorney L. L. Lewis and W. Willoughby, for the defendants and the United States.

And on another day, to wit, on the 16th day of April, 1878, in the April term of said court, in the record of the proceedings in the above-entitled cause, is the following entry in the words and figures following, to wit:

Order sustaining demurrer to suggestions.

In the circuit court of the United States for the eastern district of Virginia.

G. W. C. LEE, PLAINTIFF,
vs.
FREDRICK KAUFFMAN ET AL., DEFENDANTS. } In ejectment.

This cause came on this day to be considered, upon the suggestion of the Attorney-General of the United States, insisting that this
77 court has no jurisdiction of the subject in controversy, together with all other papers in the record showing the claim of title of the United States to said subject matter, and upon his motion to set aside the declaration and to stay and dismiss all the proceedings herein, and upon the demurrer of the plaintiff to said suggestion and motion, and was argued by counsel, on consideration whereof the court is of opinion that it hath jurisdiction in the premises, and doth accordingly sustain the demurrer of the plaintiff, and

overrule and deny the said motion of the Attorney-General of the United States.

Alexandria, 16th April, 1878.

RO. W. HUGHES, *Judge.*

And at another day, to wit, the 21st day of January, 1879, in the January term of said court, in the record of the proceedings in the above-entitled cause, is the following entry in the words and figures following, to wit:

Order for special jury.

Circuit court of the United States for the eastern district of Virginia.

TUESDAY, *January 21st*, 1879.

78 G. W. C. LEE
vs.
FREDRICK KAUFFMAN ET ALS. } In ejectment.

In this cause, the plaintiff asking for a special jury, the court orders that the marshal summon to appear in court to-morrow morning at 11 o'clock William N. Berkley, William H. Smith, Walter Walton, D. P. Smith, J. J. Moran, R. C. Fitzhugh, Henry L. Stuart, A. H. Roberts, George Wise, A. M. Allen, R. B. Roosa, J. W. Sener, Arthur Herbert, Benoni Wheat, John W. Green, William A. Moore, Josiah H. D. Smoot, George E. Price, John E. Febrey, and Oscar F. Baggott, from whom, when summoned, a special jury in this case may be selected; and further hearing postponed until to-morrow.

Plaintiff's disclaimer of title.

WEDNESDAY, *January 22d*, 1879.

G. W. C. LEE
vs.
FREDRICK KAUFFMAN ET ALS. } In ejectment.

This day came the parties, and defendants, by counsel, moved the court for leave to file a disclaimer of title, which being objected to by plaintiff was denied; to which defendants excepted, and their ex-
79 ception was noted. Thereupon the defendants suggested to the court the death of several of the defendants, and by consent this action was abated as to them. Thereupon the plaintiff, by counsel, made a tender of ($341.53) three hundred and forty-one dollars and fifty-three cents, being the amount for which the property in question was sold under the act of Congress. Thereupon, the demurrer of the defendants heretofore filed having been overruled, came a jury, to wit, William N. Berkley, Walter Walton, R. B. Roosa, Emanuel Francis, John Perry, William A. Moore, George Wise, George W. Francis, A. H. Roberts, Josiah H. D. Smoot, J. W. Sener, and Benoni Wheat, who having been duly selected and sworn to try the issue joined, and having partly heard the testimony, the further hearing postponed until to-morrow.

struction which they put upon the law of 1862 and 1863, was so generally known and announced as to amount to a waiver of tender on their part, and that he was thereby exonerated from the useless task and nugatory formality of making tender or offer of payment through an agent or friend (through whom he had a right to act in the matter), and was thereby relieved in law from default, and his land from forfeiture for the tax.

The single question raised by the three instructions under consideration is therefore whether the tax imposed upon this estate by the law of June 7, 1862, "for the collection of direct taxes in insurrectionary districts," as amended by the act of February 6, 1863, could be paid except by the owner in person.

The clauses of the act of 1862, as amended, under which the sale of Arlington was made, are substantially in the following words:

Section three provides "that it shall be lawful for the owners of land, within sixty days after the tax commissioners shall have fixed the amount, to pay the tax thus charged into the Treasury of the United States, or to the tax commissioners, and take a certificate thereof, by virtue whereof the land shall be discharged from the tax."

Section four declares the land forfeited on the non-payment of the tax as required by section three.

Section seven, after providing that if the tax is not paid as required in section three it shall be sold, goes on in one of its clauses to provide substantially:

"That in all cases where the owner of land shall not, on or before the day of sale, appear in person before the tax commissioners and pay the amount of the tax, with interest and cost of advertising, and request the land to be struck off for a less sum than two-thirds of its assessed value, the tax commissioners shall be authorized at the tax sale to bid off the land for the United States at a sum not exceeding two-thirds of its assessed value, unless some person shall bid a larger sum, in which case the land shall be struck off to the highest bidder."

In another clause of the same section seven it is provided substantially:

"That at the tax sale any tract of land which may be selected, under the direction of the President, for government use, for war, military, naval, revenue, charitable, educational, or police purposes, may be bid in by the tax commissioners for, and struck off to, the United States."

The same seventh section contained a clause allowing the redemption of lands after sale in the following terms: "The owner of said lots of ground, or any loyal person of the United States having any valid lien upon or interest in the same, may, at any time within sixty days after said sale, appear before the said board of tax commissioners, in his or her own proper person, and, if a citizen, upon taking an oath to support the Constitution of the United States, and paying the amount of said tax and penalty, with interest thereon from the date of said proclamation of the President mentioned in the second section of this act, at the rate of fifteen per centum per annum, together with the expenses of the sale and subsequent proceedings, to be determined by said commissioners, may redeem said lots of land from said sale, &c., &c."

These having been the provisions of the law in force at the time
83 of the tax sales under consideration, it is obvious that all sales at which private persons became purchasers must have been made under the first-quoted clause of section seven; and, the price bid for Arlington ($26,200) having been more than two-thirds of its assessed value ($22,733), and it having been struck off to the United States at

such price, it is equally obvious that the sale of Arlington was made under the second-quoted clause of the section seven, and could not have been made under the clause first quoted.

Upon this state of the law, the Supreme Court of the United States, in the case of Bennett vs. Hunter, 9 Wallace, 326, in which Bennett had purchased land under the first clause of section seven above quoted decided that a tender of the tax by an agent of the owner to the tax commissioners before the tax sale was equivalent to a payment, so as to destroy their authority to sell and to render their sale invalid; and it so held, notwithstanding the language of the first above-quoted clause of section seven, providing that sale might be made in all cases in which the owner had not, before the sale, appeared in person before the tax commissioners and paid the tax. The court expressly remarked in its decision that it "did not perceive in the terms of the act any limitation of the right of paying the tax to the owner in his proper person."

In ascertaining who was authorized to pay the tax, which it expressly said was the only question in the case, the court seemed to feel bound to confine its view to section three as the part of the act which determined the rights of the owner of land in regard to paying the tax, a section which did not expressly require the owner to pay in person. The court, in determining this question, refused to consider the terms used in section seven, the object of which section was not to determine the rights and duties of the owner of taxed land, but the powers and duties of the tax commissioners after the owner had failed to pay the tax. It was not necessary for the court in this case to look beyond and above the terms of the statute in determining the rights of the owner of taxed land, but I think it was evidently in its mind that there was no power in Congress to impose conditions, much less disabilities, upon the owner of land subjected to taxation as to the manner of paying the tax at any time before the divestiture of his title by a tax sale made after delinquency and forfeiture. It distinguished the indefeasible right of the owner to pay the tax by an agent before sale from the right of redeeming the land after forfeiture and sale; intimating that Congress might properly limit the right of redemption to the owner in person, while it could not constitutionally prohibit payment of the tax by an agent before the sale. I say that it was not necessary for the court to resort to this higher ground in deciding Bennett vs. Hunter, but from the tenor and spirit of its language I am persuaded that the proposition was in its mind that Congress had no power to restrict the owner of land in paying the tax to payment in his own proper person.

In the case of Tacey vs. Irwin, 18 Wallace, 549, the tax sale of the land had been made to a private purchaser under the first-quoted clause of section seven. In that case no tender of the tax had been made by Irwin's agent. The language of the record on this point in the court's finding of the facts is:

"Whilst the said premises, however, were advertised for sale, his (Irwin's) brother-in-law went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer or tender of payment, because such offer or tender was, in effect, waived by said commissioners, they declining to recognize any tender unless made by the owner in proper person."

This case differed from that of Bennett vs. Hunter in the fact that there was no tender of the tax to the tax commissioners by the friend or agent of the owner. The owner's brother-in-law merely went to see after the payment of the tax, but made no formal offer or tender of it, that be-

ing virtually waived by the commissioners in declining to recognize any tender unless made by the owner in proper person. Judging from the language of the court the decision in that case, as I read it, was based, not merely on the presumption than an offer would have been made but for the refusal to recognize a tender by an agent in that particular instance, but was based also on the fact that it was the rule and practice of the commissioners so to refuse. I think a careful and unbiased reading of the decision in Tacey vs. Irwin leads to the inevitable conviction that it was based chiefly on the existence of that rule and practice, and but partially, if at all, on such declarations of the commissioners on the occasion when Irwin's brother-in-law called "to see about paying the tax," as deterred him from making a formal tender. But I think the higher principle on which both of the decisions under review were made was that the language quoted in section seven, implying a requirement that the owner should pay the tax in person, was overridden by the superior principle of constitutional law that Congress had no right in levying a tax for purposes of revenue to impose disabilities or denounce penalties for political conduct, thereby converting revenue laws into instruments for indirectly confiscating that entire estate in land which the Constitution forbids Congress from confiscating by direct laws.

But whatever view might have been in the mind of the court, Bennett vs. Hunter and Tacey vs. Irwin were cases involving lands which were sold under that provision of section seven which expressly gave authority to sell in all cases where the owners had not appeared in person before the commissioners and paid the tax. The court decided that sales thus expressly authorized were nevertheless void when the owners had, through friends or agents, tendered payment of the tax, and that the law would presume that owners were ready to make offer of payment by friends or agents if such offer had not been rendered nugatory in advance by a rule and practice of the commissioners to receive the tax only from owners in person. If, therefore, sales expressly authorized by the language of section seven were void, then for a stronger reason was the sale of Arlington void, which could not, as I conceive, have been made under this clause of section seven, apparently containing such express authority, but was made under another clause of that section, which authorized sales to the United States of such lands as the President should direct to be purchased for military, educational, or kindred purposes, without reference to whether or not the owner had offered to pay the tax by a friend or agent. If the principle on which the Supreme Court decided the sales of Hunter's and Irwin's lands to be void was so strong as to override express language authorizing them found in the law, it certainly may be followed in the present case, where the land was sold under a provision which, in terms, gave no authority to sell lands of persons who had not appeared in person to pay the tax.

I cannot agree with defendants' counsel in the opinion that the two clauses in section seven, one of them authorizing sales to both government and private persons, but restricting the government to bids not exceeding two-thirds the assessed value of the lands, and the other clause directing the sale of lands to the United States without restriction of price when the President ordered their purchase for certain purposes, as both governing in such sales as that of Arlington. I think the clauses are distinct and several, each of them authorizing sales which could not have been made under the other. The sale of Arlington could not have been made under the prior clause of section

seven, because it was not made to a private person, nor made to the United States at a price less than two-thirds of its assessed value. How, therefore, could both clauses have governed in this sale?

84 The language of the prior clause imposing disabilities as to the payment of the tax, by restricting the right to owners in person, is for that reason to be construed strictly, is to be given as limited an application as possible, and is not unnecessarily to be extended to other clauses of section seven.

But even if this rule of construction did not govern, I do not think that the language of the clause authorizing the sale of the lands of all owners who had not appeared in person and paid their taxes could, by any logical construction, be extended to the other clauses of section seven. This clause is an independent provision, not found in the original law, not necessary to the sense of any other part of the law either in its original or present form, not connected grammatically or in logical course of thought with the context, but interjected into a place in the section no better suited to its admission than any other place, and having every characteristic of a piece of patch-work. I do not think it has any control over the other clause, standing at a distance from it, in section seven, under which Arlington was sold; and I do not think that the theory of defendants' counsel that the two clauses apply inseparably to all sales is tenable.

I do not think I ought to pass unnoticed the distinction which defendants' counsel drew in their argument for their instruction No. 1 between a tax sale made to a private purchaser, such as was passed upon by the Supreme Court in the two cases which have been under consideration, and a sale made to the United States, no instance of which has been considered by the Supreme Court in connection with the question whether or not an owner could pay his tax by an agent and not in person. They base this distinction upon the pretension that, although under the decision, of the Supreme Court in the two cases referred to a tender or offer of the tax made before the tax sale by a friend or agent of the owner is valid against the purchaser if the land be afterwards purchased by a private person, yet, if the purchaser turn out to be the United States, that fact, under the language of the first-quoted clause of section seven, will retroactively render the tender or offer of the tax by a friend or agent, which was valid and sufficient before the sale, void afterwards as against the United States. I have already expressed the opinion that the language in the clause of section seven referred to does not apply to a sale to the government made under direction of the President, as this sale of Arlington was. But even if the case were otherwise, I do not see how such a distinction as counsel have taken can be maintained.

The decision in Bennett vs. Hunter and Tacey vs. Irwin were intended to define the rights of owners of lands assessed with taxes during the period anterior to the tax sales. The first decision distinguished between the rights of a land-owner before the tax sale and his rights after the sale. It held that, as the object of the law under review was to raise taxes and not to inflict penalties for political conduct, it must be construed with reference to and in aid of that object. It held that an owner of taxed land had a right to pay the taxes due through a friend or agent before sale; and the Chief Justice, I repeat, discriminated between this right of paying taxes by an agent and the absence of the right to redeem lands after their sale for taxes except in person. Those decisions establish the right of any owner of land, taxable under

the laws of Congress imposing direct taxes to pay the tax by a friend or agent at any time before the tax sale.

If the owner had this right to tender or offer payment of a tax through a friend or agent at any time before a sale, and the right was denied him, then it is difficult to see how a subsequent sale to a particular purchaser could, by ex post facto and penal operation, annul that right. A law which makes such discrimination would seem to be unconstitutional, not only in giving to an act performed by government officials under it an ex post facto and penal effect' but also in depriving a person of his vested right in property by a process other than "due process of law," as that phrase is used by the Constitution. The impolicy of such a provision of law is as obvious to me as its unconstitutionality. Its evil would be able to fall not only upon disloyal but upon the most loyal citizens. A severe illness, lasting only ninety or a hundred days, would subject the owner of land to the irreclaimable loss of its possession and of all but two-thirds of its value; for the period of advertisement, added to the sixty days allowed by the act for redemption, would require an illness of less than a hundred days to divest a citizen of his estate.

We can imagine, too, a case of even grosser injustice, which might happen by accident, though my respect for the government forbids me to think it could be morally possible by design. It might happen by accident that government, desiring a piece of land belonging to a loyal citizen engaged in its military service, might in time of war order his command to a distant and protracted service, rendering it impossible for him "to appear in person before the tax commissioners and pay the amount of his tax," and thereby bring on a sale of it for taxes, at which sale it would itself have the power to obtain the land irreclaimably. The familiar expedient employed by King David towards Uriah would here be repeated by accident. I doubt the constitutionality of any provision of a law for raising revenues which would subject to forfeiture lands upon which the taxes, when tendered in behalf of the owner, would by its own terms be prohibited from being received. A law passed for raising taxes, if containing provisions inflicting, without trial, disabilities and penalties for political conduct, in defeat of revenues, would be construed by any court liberally in aid of the provisions for raising revenues, and very narrowly as to the provisions inflicting penalties in defeat of revenues. I think I may construe the decisions of the Supreme Court, in the two cases which have been cited, as going to the extent of holding that the owner of land assessed for taxes under the laws of 1862–'63 might pay them, or tender or offer to pay them, through an agent, at any time before the tax sale, as against all purchasers, whether private individuals or the United States. I therefore feel bound to refuse the instruction No. 1 prayed for by defendants' counsel.

On the other hand, on the authority of the decisions of the Supreme Court in Bennett vs. Hunter and Tacey vs. Irwin rendered upon the proceedings of the same tax commissioners as sold Arlington, and the validity of whose certificate of sale is now impeached on the same grounds as were relied upon in those cases, I feel not only authorized but bound to give the two instructions asked for by the plaintiff.

They are in these words:

INSTRUCTIONS FOR THE PLAINTIFF.

1. If the jury believe from the evidence that Philip R. Fendall, for and on behalf of the owner of the property in controversy, prior to the

sale thereof of the tax commissioners, on the 11th day of January, 1864, offered to pay the amount chargeable on said property, under the act of Congress entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," approved June 7th, 1862, and the acts amendatory thereof; and that said offer was refused by said commissioners because it was not made by the owner in person, then said sale was unauthorized, and conferred no title upon the purchaser.

2. If the jury believe from the evidence that the commissioners, prior to January 11th, 1864, established, announced, and uniformly followed a general rule, under which they refused to receive, on property which had been advertised for sale, from any one but the owner or a party in interest, in person, when offered, the amount chargeable upon said property, by reason of said acts of Congress, then said rule dispensed with the necessity of a tender, and, in absence of proof to the contrary, the law presumes that said amount would have been paid; and the court instructs the jury that, upon such a state of facts, the sale of the property in controversy, made on the said 11th day of January, 1864, was unauthorized, and conferred no title upon the purchaser.

The court also granted the defendants, instructions marked' Nos. 6, 7, 8, 18, 10, 11, 13, 22, & 24.

85 *Order for nonsuit.*

Thereupon the plaintiff, by his attorneys, not prosecuting this suit further as to any of the defendants except Frederick Kauffman and Richard P. Strong, but desiring the same to be discontinued as to the defendants not so excepted, it is ordered that he be nonsuited as to them, and pay to them five dollars damages, according to law, besides the costs by the said defendants about their defence expended, to be taxed.

And thereupon the defendants Kauffman and Strong moved the court that this suit be discontinued as to them, which motion was denied by the court, and defendants excepted thereto. And thereupon the defendants move that the testimony in relation to the practice of the commissioners not to receive the taxes except from the owners in person, after advertisement and before sale, be excluded from the consideration of the jury, which motion was denied by the court. Thereupon the defendants' move that the testimony in relation to a party offering in behalf of the owner to pay the taxes after advertisement and before sale be excluded from the consideration of the jury, which
86 motion was denied by the court. And thereupon the plaintiff paid into the registry of the court the sum of ($341.53,) three hundred and forty-one dollars and fifty-three cents, being the amount found due by the court on account of tax, penalty, costs, and interest on the sale of the land in controversy in this suit.

And thereupon the further hearing postponed until to-morrow.

WEDNESDAY, *January 29th*, 1879.

G. W. C. LEE
vs. } In ejectment.
FREDRICK KAUFFMAN ET ALS.

This day came the parties, by their attorneys, and the jury heretofore

sworn in this cause having appeared pursuant to their adjournment, and answered to their names, thereupon the defendants' attorney offered instructions numbered 25, 26, 27, & 28, which were granted. Thereupon the plaintiff offered instruction numbered 3, which was objected to by the defendant, but granted by the court. Thereupon the defendant offered in evidence the record in the cause of "Lee vs.
87 Branham," which was admitted; and argument of counsel having been partly heard, further hearing postponed until to-morrow.

THURSDAY, *January 30th*, 1879.

G. W. C. LEE
vs.
FREDRICK KAUFFMAN ET ALS. } In ejectment.

This day came again the parties, by their attorneys, and the jury heretofore sworn in this cause having fully heard the argument of counsel, on their oaths returned a verdict as follows:

Verdict.

We, the jury, find for the plaintiff, upon the issue joined, that he is entitled in fee to the whole of the premises in the declaration mentioned and described; and we further find that the defendant Kauffman is in possession of so much of the said premises as is enclosed within the walls of the National Cemetery, and containing two hundred acres, more or less; and that the defendant Strong is in possession of the remaining portion of the said premises in the declaration mentioned and described, with the exception of seventeen acres and fifty-three one-
88 hundredths of an acre, more or less, part thereof, bounded and described as follows, to wit: Beginning at the intersection of the south line of the Arlington estate with the centre line of a small run, said point of intersection being about one-fourth of a mile from the southwest corner of said Arlington estate, running thence westerly along said south line seven chains and forty links; thence in a northeasterly direction on a line making an angle of thirty-five degrees with the said south line twenty-two chains and thirty-eight links; thence at right angles in a southeasterly direction fifteen chains and sixty-seven links to the said south line of the Arlington estate; thence westerly along the said south line of the Arlington estate nineteen chains and ninety-two links, to the place of beginning; which said seventeen acres and fifty-three one hundredths of an acre are in the possession of one Maria Syphax.

WM. N. BERKLEY,
Foreman.

Thereupon defendants, by counsel, by leave of court, filed a motion for a new trial, which motion is ordered to be docketed and continued; which motion is in the words and figures following, to wit:

89 *Motion for new trial.*

In the circuit court of the United States for the eastern district of Virginia.

G. W. C. LEE
vs.
STRONG & KAUFFMAN. } In ejectment.

The defendants move for a new trial on the following grounds:
That the court erred in overruling the objection made by defendants

to the introduction of evidence, to which exceptions were taken by defendants, and to overruling objections made by defendants to orders made by the court during the progress of the trial.

That there is no evidence in the cause to sustain the verdict, and the verdict is against the evidence.

That the court erred in excluding evidence offered by the defendants; to which exclusion exceptions were taken.

W. WILLOUGHBY,
Counsel for Def'ts.

(Endorsed:) 1327. Circuit court of the U. S., eastern district of Va. G. W. C. Lee vs. Fredrick Kauffman et als. In ejectment. Motion for a new trial. Filed January 30th, 1879. M. F. Pleasants, clerk.

90 And on this day, to wit, the 30th day of January, 1879, the parties plaintiff and defendant filed in the clerk's office of said court their stipulation in the above-entitled action; which stipulation, with the endorsements thereon, is in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Virginia.

G. W. C. LEE
vs.
F. KAUFFMAN ET ALS. } In ejectment.

It is hereby stipulated that a bill of exceptions may be prepared and entered as of the present term, at the time to which this court has adjourned in April next.

W. WILLOUGHBY,
Counsel for Def'ts.
S. FERGUSON BEACH,
Of Counsel for Plaintiff.

JAN'Y 30, 1879.

(Endorsed:) 1327. G. W. C. Lee vs. F. Kauffman et als. In ejectment. Stipulation. Filed January 30th, 1879. M. F. Pleasants, clerk

91 And on another day, to wit, the 3d day of April, 1879, in the April term of said court, the following amongst other proceedings were had, and appear of record in the words and figures following, to wit:

Motion for new trial overruled.

G. W. C. LEE
vs.
FREDRICK KAUFFMAN ET ALS. } In ejectment.

And now, at this day, came the parties, by their attorneys, and the defendants' motion for a new trial heretofore filed herein, having been argued by counsel and maturely considered by the court, is denied.

Judgment.

Therefore it is considered by the court that the plaintiff recover against the defendants Kauffman and Strong the possession of the

premises in the declaration mentioned, according to the verdict of the jury, that is to say: Against the defendant Kauffman so much of the said premises as is enclosed within the walls of the national cemetery, and containing two hundred acres, more or less; and against the defendant Strong the remaining portion of the said premises, with the exception of seventeen acres, and fifty-three one-hundredths of an acre, more or less, part thereof, bounded and described as follows, to wit:

92 Beginning at the intersection of the south line of the Arlington estate with the centre line of a small run, said point of intersection being about one-fourth of a mile from the southwest corner of said Arlington estate, running thence westerly along said south line seven chains and forty links; thence in a northeasterly direction on a line making an angle of thirty-five degrees with the said south line twenty-two chains and thirty-eight links; thence at right angles in a southeasterly direction fifteen chains and sixty-seven links to the said south line of the Arlington estate; thence westerly along the said south line of the Arlington estate nineteen chains and ninety-two links to the place of beginning (which said seventeen acres and fifty-three one-hundredths of an acre are in the possession of one Maria Syphax); and that the plaintiff recover of the defendants his costs about his suit in this behalf expended.

Thereupon defendants, by counsel, moved the court that they be allowed a writ of error to the Supreme Court of the United States in this case, which motion was granted; and thereupon the defendants,

93 by W. Willoughby, its attorney, presents to the court its bill of exceptions herein, which was allowed, signed, and filed, and made part of the record in this action, in pursuance of a stipulation of counsel heretofore filed herein.

BILL OF EXCEPTIONS.

In the circuit court of the United States for the eastern district of Virginia.

GEORGE W. P. C. LEE
vs.
FREDRICK KAUFFMAN & OTHERS.

Be it remembered that on the trial of this cause, and before the jury was empanneled, the defendants, by their counsel, asked leave to file the following paper, to wit:

Disclaimer of title.

In the circuit court of the United States for the eastern district of Virginia.

GEORGE W. P. C. LEE
vs
FREDRICK KAUFFMAN, R. P. STRONG, & others.

The defendants, except Syphax, say that they set up no claim of right to the title of the land in controversy; that they are not, nor

94 are any of them tenants of the freehold or claiming so to be, and they disclaim such tenancy; and such of them as are in the oc-

cupation of any portion of such land claim a right to such occupation only by virtue of authority of the United States directing or permitting them to occupy it as the propertyof the United States.

W. WILLOUGHBY,
Counsel for Def'ts.

To which the plaintiff, by his counsel, objected, upon the grounds that it did not state definitely which of the defendants were in the occupation of the premises, and that no plea could be made by the defendants except the plea of not guilty, already filed. Whereupon the court sustained such objection, and refused to allow the said paper to be filed; to which ruling of the court the defendants then and there excepted, which exception is duly entered of record, and is certified accordingly.

The defendants counsel then suggested the death of four defendants, Robert Carter, Alfred Gardner, Benjamin Cole, and Spencer Pascoe, whom he stated were in the occupation of a portion of the prem-
95 ises, whereupon it was ordered that as to them the suit abate

Counsel for the plaintiff then stated their readiness to pay into court the amount of the taxes, penalty, costs, and interest, for the use of the United States, as provided by the act of May 9th, 1872, whenever the amount could be ascertained. Whereupon it was agreed by counsel for defendants that such amount should be subsequently ascertained, and might be paid at any time before the case should be submitted, which sum was subsequently ascertained to be $341.53, and which was, before the case was submitted to the jury, paid to the clerk of the court, for the use of the United States, according to the provisions of the aforesaid act of Congress.

The jury were then empanelled and sworn, and the counsel for the respective parties having presented the case in opening statements to the jury, the plaintiff, to maintain the issue on his part, produced as a witness W. H. F. Lee on his behalf, who testified as follows:

Testimony of W. H. F. Lee.

I reside in Fairfax County, Virginia, and am a brother of the plaintiff.

I am well acquainted with the Arlington estate, in Alexandria
96 County, and was well acquainted with it during the life of George W. P. Custis. He was my grandfather. The estate was in his possession as long as I can remember. He died in 1857, at Arlington, and he was in the peacable and quiet possession of the estate to the time of his death, and as far back as I can remember, which is at least thirty-five years ago. I was born there. He was in possession as owner according to my earliest recollection.

Arlington, as it is now held by the government, is substantially identical in boundary with the property when it was owned and occupied by my grandfather, so far as I know. I have always understood the extent of the estate to be 1,100 acres. Mrs. Lee, my mother, was the only child and heir-at-law of Mr. Custis. W. H. F. Lee, Mary C. Lee, Robert E. Lee, and Mildred C. Lee were the only living children and heirs-at-law of my mother, Mary Ann Randolph Lee, excepting Custis Lee, the plaintiff in this suit, at the time of the execution of a deed of release by them of this property to Custis Lee, the plaintiff, April 16th, 1874. My mother died in 1873.

97 Cross-examination:

I resided with my father and mother at Arlington the greater

part of my early life. They left the place early in 1861. Since that time there has been no occupation of the place by my mother nor by the plaintiff in this case.

Re-examination:

When my father and mother left, a Mr. McQuinn was left in charge of the place as overseer. I have heard that he remained there until April, 1865. So far as I know, he was the agent of my father, though I do not mean that he was in control of the premises but a short time after my father left; how long I do not know.

Testimony of Louis E. Payne.

The plaintiff then produced as a witness in his behalf Louis Payne, clerk of the court of Alexandria County, for the purpose of producing the land-books of the county, and to prove that the land was listed during Mr. Custis' lifetime and taxed as his property. Whereupon the counsel for defendants admitted such to be the fact.

The plaintiff then produced as a witness in his behalf Charles M. Castleman, who testified that he was for many years, during the
98 lifetime of Mr. Custis, sheriff of Alexandria County, and that during those years he, as such sheriff, received the taxes upon the Arlington estate from Mr. Custis, and produced a number of books and papers showing that such taxes were assessed to Mr. Custis, and that he had paid the same.

Counsel for the plaintiff then offered in evidence what purported to be a certified copy of the will of Mr. Custis from the records of the county of Alexandria, of which the following is a copy, to wit:

Will of G. W. P. Custis.

In the name of God, amen, I, George Washington Parke Custis, of Arlington House, in the county of Alexandria and State of Virginia, being sound in body and mind, do make and ordain this instrument of writing as my last will and testament, revoking all other wills and testaments whatever. I give and bequeath to my dearly-beloved daughter and only child, Mary Ann Randolph Lee, my Arlington House estate, in the county of Alexandria and State of Virginia, containing eleven hundred acres, more or less, and my mill on the Four-Mile Run, in the county of Alexandria, and the lands of mine adjacent to said
99 mill, in the counties of Alexandria and Fairfax, in the State of Virginia, the use and benefit of all just mentioned, during the term of her natural life, together with my horses and carriages, furniture, pictures, and plate, during the term of her natural life.

On the death of my daughter, Mary Ann Randolph Lee, all the property left to her during the term of her natural life I give and bequeath to my eldest grandson, George Washington Custis Lee, to him and his heirs forever, he, my said eldest grandson, taking my name and arms.

I leave and bequeath to my four granddaughters, Mary, Ann, Agnes, and Mildred Lee, to each ten thousand dollars.

I give and bequeath to my second grandson, William Henry Fitzhugh Lee, when he shall be of age, my estate called the White House, in the county of New Kent and State of Virginia, containing four thousand acres, more or less, to him and his heirs forever.

I give and bequeath to my third and youngest grandson, Robert Edward Lee, when he is of age, my estate in the county of King

100 William and State of Virginia, called Romancock, containing four thousand acres, more or less, to him and his heirs forever.

My estate of Smith's Island, at the capes of Virginia, and in the county of Northampton, I leave to be sold to assist in paying my gran'daughter's legacies to be sold in such manner as may be deemed by my executors most expedient.

Any and all lands that I may possess in the counties of Stafford, Richmond, and Westmoreland I leave to be sold to aid in paying my gran'daughter's legacies.

I give and bequeath my lot in square No. 21, Washington City, to my son-in-law, Lieut. Col'n Robert E. Lee, to him and his heirs forever. My daughter, Mary A. *B.* Lee, has the privilege by this will of dividing my family plate among my grandchildren, but the Mount Vernon altogether, and every article I possess relating to Washington and that came from Mt. Vernon, is to remain with my daughter at Arlington House during said daughter's life, and at her death to go to my eldest grandson, George Washington Custis Lee, and to descend from him entire and unchanged to my latest posterity.

101 My estates of the White House, in the county of New Kent, and Romancock, in the county of King William, both being in the State of Virginia, together with Smith's Islands, and the lands I may possess in the counties of Stafford, Richmond, and Westmoreland Counties are charged with the payment of the legacies to my gran'daughters.

Smith's Island and the aforesaid lands in Stafford, Richmond, and Westmoreland only are to be sold, the lands of the White House and Romancock to be worked to raise the aforesaid legacies to my four gran'daughters.

And upon the legacies to my four gran'daughters being paid, and my estates that are required to pay the said legacies being clear of debt, then I give freedom to my slaves, the said slaves to be emancipated by my executors in such manner as to my executors may seem most expedient and proper, the said emancipation to be accomplished in not exceeding five years from the time of my decease.

And I do constitute and appoint as my executors Lt. Colonel Robert Edward Lee, Robert Lee Randolph, of Eastern View, Rt. Rev'd Bishop Meade, and George Washington Peter.

102 This will, written by my own hand, is signed, sealed, and executed the twenty-sixth day of March, eighteen hundred and fifty-five.

GEORGE WASHINGTON PARKE CUSTIS. [SEAL.]

26th March, 1855.

Witness:
MARTHA CUSTIS WILLIAMS.
M. EUGENE WEBSTER.

At a county court held for Alexandria County, on the seventh day of December, 1857, the foregoing paper writing, purporting to be the last will and testament of George Washington Parke Custis, was produced in court for probate by Robert E. Lee, one of the executors named therein, and Cassius F. Lee was sworn as a witness, who deposed that he is well acquainted with the handwriting of the said George W. P. Custis, and that he verily believes the whole of said paper writing, together with the signature thereto, are in the genuine handwriting of said George W. P. Custis; thereupon the said paper writing is ordered to be record-

ed as and for the last will and testament of the said George W. P. Custis.

Robert E. Lee, one of the executors named in the last will and testament of Geer'e W. P. Custis, qualified and gave bond, with
103 security, according to law, the security haveing justified.

Teste:

B. H. BERRY, *Clerk.*

CITY OF ALEXANDRIA, *to wit:*

I, Morton Marye, clerk of the corporation court of the city of Alexandria, in the State of Virginia, do certify that the foregoing is a true copy from the records in my official custody.

In testimony whereof I hereto set my hand and affix the seal of the said court this 21st day of January, 1879.

MORTON MARYE, *Clerk.*

VIRGINIA,

City of Alexandria, to wit:

I, E. Magruder Lowe, judge of the corporation court of the city of Alexandria, do certify that Morton Marye, whose name is signed to the foregoing certificate dated this 21st day of January, 1879, is clerk of said court, that his said signature is genuine, and that said certificate is in due form.

Witness my hand this 21st day of January, 1879.

[SEAL.] E. MAGRUDER LOWE,

Judge of the Corporation Court of the City of Alexandria.

104 To the reading of which as evidence the counsel for defendants objected, on the ground that the original will itself should be produced and proved as the best evidence.

The court overruled the objection, to which ruling the counsel for defendants then and there excepted, which exception is duly entered of record, and is certified accordingly.

And thereupon said copy of said will was read in evidence to the jury.

Counsel for plaintiff then offered and read in evidence, the will of Mrs. Mary Ann Lee, of which the following is a copy, to wit:

Will of Mary C. Lee.

In the name of God, amen, I, Mary Custis Lee, the widow of General Robert E. Lee, do make, publish, and declare this as my last will and testament.

In compliance with the wishes expressed in the last will and testament of my deceased husband, Robert E. Lee, and by virtue of the power and authority therein conferred upon me, I appoint and direct as follows:

First. That owing to an arrangement between my children sat-
105 isfactory to them, and my sons W. H. F. Lee and Robert E. Lee having in writing relinquished all benefit, present or prospective, in the estate of their father, Robert E. Lee, deceased, it is my will and desire, in view of said agreement and relinquishment, that the said W. H. F. Lee and Robert E. Lee be excluded from any participation in the estate of the said Robert E. Lee, deceased.

Second. It is my will and desire, and I do so appoint and direct, that

all the estate of the said Robert E. Lee shall, upon my decease, be equally divided between my son G. W. Custis Lee and my three daughters, Mary, Mildred, and Agnes, share and share alike, each taking one equal fourth part.

Third. Should my son G. W. Custis Lee recover the estate called Arlington, situate in the county of Alexandria, Va., or be paid therefor by the Government of the United States, then and in that event it is my will and desire, and I so appoint and direct, that the one-fourth part of his father's estate given to him, the said G. W. Custis Lee, in the foregoing clause of my will shall pass and belong to my three daughters above named, in equal portions.

106 I appoint my sons G. W. Custis Lee and W. H. F. Lee executors of this my last will and testament, without security.

Given under my hand and seal this 9th day of June, A. D. 1873.

MARY CUSTIS LEE. [SEAL.]

Signed, sealed, published, and declared by the testatrix, Mary Custis Lee, as and for her last will and testament, in the presence of us, who, in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.

A. M. LEE.

FRANCIS L. SMITH.

At Rockbridge County court, August 5th, 1874, a writing purporting to be the last will and testament of Mary Custis Lee was produced in court and partly proved by the oath of A. M. Lee, a subscribing witness thereto, and continued for further proof. And on the motion of G. W. Custis Lee, the executor named in the foregoing named writing, to admit to probate another paper, bearing date Nov. 3d, 1857, as and

107 for the will of Mary Custis Lee, it appearing to the court by the oath of Mrs. A. M. Lee that the said paper is wholly in the handwriting of said Mary Custis Lee, but it also appearing that at the date of said paper she was a married woman, and it not appearing whether the said paper was or was not a disposition of any separate estate, the motion to admit the same to probate is continued for further proof.

Teste:

J. P. MOORE, *C. C.*

And at Rockbridge County court, September 9th, 1874, the last will and testament of Mrs. Mary Custis Lee having been partly proven in this court, on the third day of the last term thereof, was this day again produced in court and fully proved by the oath of Francis L. Smith, the other subscribing witness thereto, and ordered to be recorded.

And W. H. F. Lee, one of the executors named in the will, failing to appear, liberty was reserved for him to qualify hereafter should he elect so to do. And thereupon G. W. Custis Lee, the other executor named in the will, appeared in court, made oath, and, without

108 security, according to the conditions of the will, entered into and acknowledged a bond in the penalty of $100,000.00, conditioned according to law, certificate was granted the said G. W. Custis Lee for obtaining a probate of said will in due form, and said bond is ordered to be recorded.

And it is ordered to be entered of record that the value of the estate passing by said will was estimated not to exceed $50,000.00, and that $50.00 State tax was paid thereon.

And it appearing to the court that the paper offered for probate with the will on the 5th day of August last, bearing date Nov. 3d, 1857, was

executed by the decedent when she was a feme covert, and that it does not dispose of any separate estate, the court doth reject the probate of the said writing bearing date Nov. 3d, 1857.

A copy. Teste:

J. P. MOORE, *C. C.*

STATE OF VIRGINIA,

In Rockbridge County Court Clerk's Office:

I, J. P. Moore, clerk of the county court for the county aforesaid, in the State of Virginia, do certify that the foregoing is a true copy of Mrs. Mary Custis Lee's will, on record in this office in will
109 book No. 21, page 179.

In testimony whereof I hereunto set my hand and affix the seal of said court January 23d, A. D. 1879.

[SEAL.] J. P. MOORE, *C. C.*

STATE OF VIRGINIA,

Rockbridge County, to wit:

I, J. K. Edmondson, only judge of the county court of said county, do hereby certify that J. P. Moore, whose genuine signature appears to the foregoing certificate of attestation, is now, and was at the time of signing the same, clerk of the county court in and for said county of Rockbridge and keeper of the records and seal thereof, duly elected and qualified to office, and that the said certificate of attestation is in due form of law and by the proper officer.

Given under my hand and seal January 23d, 1879.

J. K. EDMONDSON, [SEAL.]
Jud'g R. C. C.

Counsel for plaintiff then read in evidence certified copy of deed of release to plaintiff, dated April 16th, 1874, from the heirs of Mrs. Mary Ann Lee, other than himself, of which the following is a copy, to wit:

Deed of release.

110 This deed, made the sixteenth day of April, in the year of our Lord eighteen hundred and seventy-four, between William Henry Fitzhugh Lee and Mary T. Lee, his wife, Mary Custis Lee, Robert E. Lee, and Mildred Childe Lee, of the first part, and George Washington Custis Lee, of the second part, witnesseth: That in consideration of natural love and affection, and of the sum of ten dollars, the said parties of the first part do hereby give, grant, alien, release, convey, and confirm to the said party of the second part all and every right, title, interest, and estate, at law or in equity, vested or contingent, in reversion or remainder, which we or either of us may have, own, or possess in and to the tract of land called "Arlington," in the county of Alexandria, Virginia, containing eleven hundred acres, more or less, and the tract of land on Four-Mile Run, in the county of Alexandria, and the lands in the county of Alexandria and Fairfax adjacent to said mill tract. Which said tracts of land were formerly the property of George Washington Parke Custis, of "Arlington House," in the said county of Alexandria, Virginia, and were by him de-
111 vised to his daughter, Mary Ann Randolph Lee, during the term of her natural life, and upon her death to the said George Washington Custis Lee, to him and his heirs forever, to have and to hold the

right, title, and interest, and estate hereby intended to be conveyed to the said George Washington Custis Lee, his heirs assigns forever; and the said parties of the first part do hereby, for themselves and their heirs, covenant to and with the said George Washington Custis Lee that they and each of them, and their and each of their heirs, will execute and deliver any other and further deeds that may be requisite to convey the right, title, interest, and estate of the said parties of the first part, and their heirs above described, to the said George Washington Custis Lee, or his heirs or assigns.

Witness the following signatures and seals:

MARY CUSTIS LEE. [SEAL.]
MARY T. LEE. [SEAL.]
W. H. F. LEE. [SEAL.]
R. E. LEE. [SEAL.]
MILDRED C. LEE. [SEAL.]

112 STATE OF VIRGINIA,
County of King William, to wit:

I, A. Robinson, a justice of the peace for the county aforesaid, in the State of Virginia, do certify that William Henry Fitzhugh Lee, Robert E. Lee, and Mildred Childe Lee, whose names are signed to the writing above, bearing date the 16th day of April, 1874, have acknowledged the same before me, in my county aforesaid. Given under my hand this 1st day of May, 1874.

A. ROBINSON, *J. P.*

STATE OF VIRGINIA,
City of Petersburg, County of Dinwiddie, to wit:

We, H. L. Athessa and T. A. St. Clair, justices of the peace for the said city, in the State of Virginia, do certify that Mary T. Lee, the wife of William Henry Fitzhugh Lee, whose names are signed to the writing above, bearing date on the 16th day of April, 1874, personally appeared before us, in the city aforesaid, in the State aforesaid, and being examined by us privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said Mary T. Lee,
113 acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under our hands this 4th day of September, anno Domini, 1874.

H. L. ATHESSA, *J. P.*
T. A. ST. CLAIR, *J. P.*

STATE OF VIRGINIA,
Rockbridge County, to wit:

I, Chas. A. Demaron, a notary public for the county aforesaid, in the State of Virginia, do certify that Miss Mary Custis Lee, whose name is signed to the writing above annexed, bearing date on the 16th day of April, 1874, have acknowledged the same before me, in my county aforesaid.

Given under my hand this 14th day of September, 1874.

CHAS. A. DEMARON,
Notary Public.

(Deed endorsed:) Wm. H. Fitzhugh Lee & wife & others to G. W. Custis Lee. Deed of release. Clerk's office, Alexandria County court, De-

cember 7th, 1874. This deed was received in the office, with certificate annexed, and admitted to record. Teste, Louis E. Payne. Recorded in liber B, No. 4, folio 414. Teste, Louis E. Payne, clerk.

Testimony of Geo. R. Adams.

GEORGE R. ADAMS, a witness on behalf of the *the* plaintiff, was then sworn, who testified:

I reside in Alexandria County; I have lived there fifteen years; I have been acquainted with the Arlington property ever since my earliest recollection. I was born and raised in Georgetown, right opposite Arlington, and I am now sixty-eight years of age. I knew it during the lifetime of Mr. Custis; I do not know the extent of the estate, but have heard that it was 1,200 acres.

114 Question. Are the boundaries of the estate as it is now held by the government substantially identical with the boundaries of the estate during the lifetime of Mr. Custis? You are familiar with the boundaries of the estate, are you not?

Answer. Yes, sir; I know the boundaries. I remember the old church that Mr. Custis built some years ago, and that is upon the estate. I think the estate ran over to Mr. Johnson's line.

Question. The estate at present is substantially the same as it was during the lifetime of Mr. Custis? You might look at this draft, Mr. Adams. (Gives witness a plat of the estate.)

By the COURT. Is that the map filed with the declaration?

COUNSEL FOR PLAINTIFF. It is in the case; I do not know how it got here.

Answer. I believe (pointing to the map) that boundary to be the limit as I knew it; there is where the church stands, where I was in the habit of going, and that church is near about the line. Mr. Custis built that church, which I went to from, I think, about 1828 to 1835 or '36, or somewhere along there. Mr. Custis was in possession as

115 owner from my earliest recollection down to the time of his death.

Testimony of S. B. Corbitt.

SEWAL B. CORBITT then testified, on behalf of the plaintiff, that for eight or ten years prior to the death of Mr. Custis he lived near him; that Mr. Custis was then in possession of Arlington as owner, and that the Arlington estate at that time was substantially identical in boundary with what it now is.

Testimony of J. Tacey.

JEFFERSON TACEY, a witness on behalf of the plaintiff, being duly sworn, testified as follows:

I reside in Alexandria County; I served the declaration in ejectment in this case.

Question. Were the several defendants upon whom the declarations were served in the occupation of the Arlington estate at the time of the service?

Answer. All on whom I made service were in actual possession at the time.

Question. Your return shows upon whom actual service was made?

Answer. Yes, sir.

Question. You served declarations in two suits?

Ans. Yes, sir.

Question. Were all the parties in the first suit upon whom
116 you served the declarations in the occupancy of the property at the time of said service?

Ans. Yes, sir.

Question. And in the other suit was the parties upon whom you served it in occupation at the time?

Ans. Yes, sir.

Question. You were acquainted with this estate, were you not?

Ans. Yes, sir; I am treasurer of the county, and I have traversed the estate many times.

Question. The property that these defendants were occupying was the Arlington estate?

Ans. Yes, sir.

Question. (Showing witness a plat of the Arlington estate.) Is that a correct plat of the estate?

Ans. Yes, sir.

COUNSEL FOR PLAINTIFF. I now offer this plat in evidence.

Question. Look at this other paper and say whether these papers correspond in general description. (A second plat of the Arlington estate shown witness.)

Ans. This second, taken as a whole, is a different map from the
117 other, though the property in question is accurately described in both.

Question. Do you recognize any points in bounderies or objects that you know upon the land?

Ans. There is a point here commonly known as Branch, in connection with an outlet to that branch and some boggy and marshy land. I recognize the old road and the meanders of the river. Part III there corresponds with the map of Arlington on the other sheet. The older paper is the plat of the larger tract subdivided, one subdivision of which is the Arlington estate. It is a copy from the records of Fairfax.

Cross-examination by counsel for defendants:

Q. The copies of the declaration in these cases were given you to serve?

Ans. They were; yes, sir.

Q. These printed copies contained the names of the defendants?

Ans. Yes, sir.

Q. And when you went to serve these copies you endeavored to find these parties?

118 Ans. Yes, sir; I did.

Q. And when you found one of these parties you served the process upon him, taking it for granted that it was the proper party?

Ans. I knew that the party lived there. It was the place of his residence. As a general rule I knew that the parties lived there, for I was acquainted with the greater part of them. There may have been isolated cases to the contrary.

Q. But you would not be able to say that as to all?

Ans. There may have been perhaps some who were not regular occupants. I will say this for the information of counsel: that those names in the declaration were furnished by myself; I was treasurer of the county, and I knew, as a general thing, that they were parties regu-

larly assessed. It was the State assessment, the poll-tax, and perhaps some slight property tax. I furnished the names from a knowledge of the parties residing there; as a general thing I knew they were there before I served the declaration.

119 Q. Did each one of these have different tenements?

Ans. No, sir; sometimes two families resided in the same house. The house may have been square, two rooms front and two rooms back. In some portions perhaps only one family resided.

Q. Can you say, for instance, that Tibbett Allen was an occupant of that place?

Ans. Yes, sir; I know it for a fact.

Q. Do you know that John Alexander was?

Ans. He resided in the same house with John E. Curry, who had resided there for months—I would not say years.

Q. Did you serve process upon Robert Carter?

Ans. I believe he was one of the parties residing there.

Q. How was it with Oliver Gardner?

Ans. Well, he was on Fort Whipple. He may have died. He resided there a long time, and was a very old man.

Q. Where did Oliver Gardner live?

Ans. He lived in the rear of Mrs. Vincent's. That is slightly beyond Fort Whipple.

Q. Was Benjamin Cole in occupation?

Ans. Yes, sir; I believe so.

Q. Was Spencer Tasker?

Ans. Yes, sir. I knew him.

120 Q. You do mean to say, however, that all of these defendants were in the occupation of these premises?

Ans. No, sir; I would not like to say that, for this reason: Tibbet Allen might be the recognized tenant on the premises, but his tax-collector would know that there were other parties there, and knowing that, as a precaution, I would give the other parties' names, but they might be simply boarders. They were, however, on the premises. I simply give this for an example.

Q. You say that in some cases two or three might have been in the same house?

Ans. Yes, sir.

Q. Was that the case with most of them?

Ans. No, sir; there were only a few cases. I mean different families occupied different portions of the same house.

Q. In other instances each family occupied a house by itself?

Ans. Yes, sir.

Q. That was generally the case, was it not?

Ans. Yes, sir.

Q. Generally they occupied separate property by themselves?

121 Ans. I rather think there would be two or more families under the same roof. I have been speaking of the occupation of the buildings, not of the land specially.

Q. You do not mean to say particular buildings?

Ans. I speak of it as a general rule.

Q. Were these people who occupied these houses generally cultivating the land?

Ans. Yes, sir; I believe so.

Q. In some instances did you not make more than one member of a family a defendant?

Ans. No, sir; it might have accidentally occurred.

Q. Did you serve all the processes upon the premises?

Ans. Yes, sir; I was particular, I believe, on that point.

Re-examination:

Q. I understood you to say that these persons were actually in the occupation of the estate at the time these declarations were served?

Ans. Yes, sir.

Q. Do you know particularly as to Kauffman?

Ans. Yes, sir; he was in possession of the Arlington House.

122 I served the process on the back porch.

Q. (By defendants' counsel.) You served the process on Capt. Strong?

Ans. Yes, sir; he had charge of the fort at that time.

Q. Was he in command?

Ans. I understood so; I approached him as such, and he did not deny it.

Q. Did the members of his command occupy portions of this property?

Ans. Yes, sir; but I did not make any of them defendants.

Q. (By plaintiff's counsel.) They were there under his command?

Ans. Yes, sir.

Q. (By defendants' counsel.) How many were there?

Ans. I could not tell that.

Q. He was in charge of that portion as a fort?

Ans. So I understood.

Q. Was Kauffman in charge as a superintendent?

Ans. It was generally understood so; of the house and cemetery.

Testimony of M. Marye.

MORTON MARYE was then sworn as a witness for the plaintiff,

123 who testified that he was clerk of the corporation probate court at Alexandria; that the record produced by him was the original record of the probate of the will of Mr. Custis, of which record he was the legal custodian.

The plaintiff's counsel then offered to read this record in evidence, to the reading of which counsel for defendants objected, on the ground that the original will is not produced and proved.

The court overruled the objection, to which ruling of the court the defendants' counsel then and there excepted, which exception was duly entered of record, and is certified accordingly. Thereupon said record was read to the jury, it being the original record of which had heretofore been read what purported to be a copy thereof, as hereinbefore stated.

The plaintiff then proved that the original will had been lost, and then again offered the said record in evidence; whereupon the defendants, counsel objected to its being read in evidence, because the contents of the will were not proved according to law.

The court overruled the objection, and to such ruling the defendant, by his counsel, then and there excepted, which exception was duly

124 entered of record, and is certified accordingly; whereupon the said record was admitted in evidence.

The plaintiff then withdrew from the case the claim for mesne profits filed with the declaration, the defendants' counsel consenting thereto; whereupon an order was made that such claim be stricken from the case. And thereupon the plaintiff rested his case.

The defendants, to maintain the issue on their part, then offered in evidence a certified copy of the certificate of sale of the property in question, of which the following is a copy, to wit:

Certificate of tax-sale.

UNITED STATES OF AMERICA,
District of Virginia:

TAX-SALE CERTIFICATE.

Whereas John Hawxhurst, Gillett T. Watson, and William I. Boreman having been, by virtue of an act of Congress approved June 7, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," by the President, by and with the advice and consent of the Senate, duly appointed tax commissioners, and thereby constituted a board of three tax commissioners for the insurrectionary districts of the State of Virginia, to wit, so much of said State as was by the President of the United States, by his proclamation of July 1, 1862, proclaimed to be in insurrection, and the civil authority of the Government of the United States so obstructed that the act of Congress approved August 5, 1861, named in the act aforementioned, could not be peaceably executed, said William I. Boreman having resigned, and the President, by and with the advice and consent of the Senate, having, on the 28th day of January, A. D. 1864, appointed A. Lawrence Foster in his stead, the undersigned, composing the board of tax commissioners as now constituted, do hereby certify that the commissioners did, in compliance with the acts of Congress aforesaid, on the 15th day of September, 1863, fix the sum of $92.07 as the amount of tax, by virtue of said act of August 5th, 1861, due and payable to the United States, charged upon the following-described lot or parcel of land situated in the county of Alexandria, in said State, to wit: Arlington, on Georgetown road, northwest from the court-house nine miles, lately occupied by Robert E. Lee, and bounded as follows: On the north by the land of Ross; east by the Potomac River; south by the land of James Roach, Johnson, and Guy Henry; west by the land of Elliott, Columbus Alexander, and John Tucker, containing eleven hundred acres, be the same more or less, said to have belonged to Mary R. Lee, and charged to her on the land-book of the State aforsaid for the year 1860, and valued on said book at $34,100; said sum of $92.07 bearing the same direct proportion to the whole amount of direct tax, namely, $93?,550.66⅔, apportioned to said State by the act of Congress of August 5, 1861, as the value of said parcel of land was estimated to bear to the whole valuation of the real estate in said State of Virginia subject to said direct tax according to the last assessment and valuation of said real estate, and the several parcels thereof, made under the authority of said State previous to the 1st day of January, A. D. 1861, to wit, the assessment and valuation for the year 1860, whereby, in addition to said tax charged upon said parcel of land, a sum of fifty per centum of said tax became charged thereon; and that no owner or owners of said lot or parcel of land did, within sixty days after the commissioners did, on the aforesaid 15th day of September, 1863, so fix said amount, pay the tax thus charged upon the said lot or parcel of land into the Treasury of the United States, or to the commissioners holding said office during said term, or to any such commissioners at any time, by reason of which non-payment said

piece or parcel of land became forfeited to the United States; and, accordingly, the said commissioners caused the same to be advertised for sale, describing in said advertisement the aforesaid parcel of land, and distinctly stating therein said amount of $92.07 as the amount of direct tax assessed on said tract or parcel, in a newspaper published in said county of Alexandria, where said land is situate, namely, in the newspaper called the Virginia State Journal, publis*n*ed in the city of Alexandria, in said county, for four weeks previous to the day of sale; and did further advertise as above by posting notice of said sale in three public places in said county four weeks previous to said day of sale, which day of sale was advertised by said publication and said posting to take place on the 11th day of January, A. D. 1864; and thereafter, on said day last named so advertised, and at the place of sale so advertised, to wit, in said city and county of Alexandria, said commissioners
125 did cause the same to be offered for sale to the highest bidder who would bid a sum not less than the tax and penalty aforesaid, with the lawful costs, and ten per cent. per annum interest on said tax then accrued; and no person bidding the same, or a larger sum than the sum hereinafter named, and said tract, lot, or parcel of land having been selected under the direction of the President, in pursuance of an order, of which the following is a copy:

"Whereas, by the act of 1862, chapter 98, entitled 'An act for the collection of direct taxes in insurrectionery districts within the United States, and for other purposes,' it was enacted that certain land in said insurrectionary districts should be charged with taxes, and that said land should be sold for non-p'y*a*ment thereof, as therein provided; and whereas, by the act of 1863, chapter 21, approved February 6, said act of 1862 was amended; and whereas, by virtue of the power in said acts conferred, 'at any such sale any tracts, parcels, or lots of land which might be selected under the direction of the President for government use, for war, military, naval, revenue, charitable, educational, or police purposes, might at said sale be bid in [by the commissioners appointed under said act], under directions of the President, for and struck off to the United States;'

"And whereas the President, with the advice and consent of the Senate, has, in pursuance of law, appointed John Hawxhurst, William I. Boreman, and G. F. Watson as tax commissioners within and for the State of Virginia; and whereas the real estate hereinafter described: has become charged with taxes to the United States, and by reason of the non-payment thereof, and of the penalty lawfully assessed thereon, is forfeited to the United States, and has become liable to be sold under the provisions of the acts aforesaid; and whereas the said estate has been advertised to be sold for non-payment of said taxes and penalty on the 11th day of January, 1864, according to law; and whereas the President of the United States, by virtue of the authority vested in him as aforesaid, has selected for government use, for war, military, charitable, and educational purposes, the land hereinafter described:

"Now, therefore, I, Abraham Lincoln, President of the United States, have ordered and directed, and hereby order and direct, said commissioners to bid in and have struck off to the United States the following-described tract of land, for the purposes aforesaid, and in pursuance of the statutes on that behalf provided, namely, the Arlington estate, lately occupied by Robert E. Lee, bounded as follows: North by the land of Ross; east by the Potomac River; south by the land of James Roach, Johnson, and Guy Henry; west by the land

of Elliot, Columbus Alexander, and John Tucker; containing eleven hundred acres, be the same more or less.

"ABRAHAM LINCOLN,
"*President of the United States.*

"EXECUTIVE MANSION,
"*Washington, 6th Jan.*, 1864."

for government use, for war, military, charitable, and educational purposes, said commissioners did bid in the same to the United States for the sum of $26,800, being not less than the taxes, penalty, and cost, and ten per centum per annum interest on said taxes.

In testimony whereof said commissioners have hereunto affixed their signatures on this 25th day of September, A. D. 1866.

JNO. HAWXHURST,
GILLET F. WATSON,
A. LAWRENCE FOSTER,
U. S. Direct Tax Commissioners for Virginia.

STATE OF VIRGINIA,
Alexandria County, to wit:

Personally appeared before me, a justice of the peace for the State and county aforesaid, John Hawxhurst, Gillett F. Watson, and A. Lawrence Foster, parties signing the above paper, and they severally acknowledged the same to be their act and deed.

Given under my hand this 7th day of March, 1867.

ROBERT BELL, *J. P.*

VIRGINIA:

ALEX. CO. COURT CLERK'S OFFICE, *March* 7, 1867.

The foregoing certificate of sale, with the acknowledgment, was this day admitted to record.

Teste: JEFFERSON TACEY, *Clerk.*

Testimony of Jno. Hawxhurst.

The counsel for plaintiff then suggesting that there should be proof that this paper was executed as it purports to be, the counsel for defendants then produced as a witness JOHN HAWXAURST, who, being sworn, testified that he was one of the commissioners appointed under the act of Congress of June, 1862, for the collection of direct taxes in insurrectionary districts for the State of Virginia, and as such, together with A. Lawrence Foster and Gillett F. Watson, the other two commissioners, executed a certificate of sale shown to him. Mr. Boreman had been at first a commissioner, but he resigned, and A. Lawrence Foster was appointed to take his place.

126 The paper shown to him was identified as being the original certificate of sale, and was read to the jury; whereupon it was agreed that the certified copy should be admitted as evidence, which was accordingly done.

It was admitted that this certificate of sale was duly recorded in the land records of the county of Alexandria.

Upon the witness being cross-examined, the counsel for defendants stated that they objected to questions being asked upon matters not within the scope of the examination-in-chief, except as a witness for the plaintiff in such matters, and asked that he should not be cross-examined as to matters not referred to in the examination-in-chief. The court overruled such objection, and stated that as the witness had

been called, and had been interrogated in regard to the certificate of sale, the plaintiff might cross-examine him touching the recitals in said certificate of sale; to which ruling the counsel for defendants then and there excepted, which exception was duly entered of record, and is certified accordingly.

Whereupon the witness testified that he was commissioner
127 during the whole period of the commission.

Question by counsel for plaintiff:

This certificate of sale recites that the United States were the highest bidders for this property, and that their bid was $26,800. Was that amount paid by the United States to the commissioners?

Ans. No, it was not.

Q. You issued your certificate then without having received the purchase-money?

Ans. We did not receive anything on that.

To this evidence the counsel for defendants objected, upon the grounds, first, that it was not within the sphere of the direct examination, and, second, that it was not one of those things that according to the law could affect the certificate of sale as evidence of its regularity and validity.

The court overruled the objection, to which ruling the counsel for defendants then and there excepted, which exception was duly entered of record, and is certified accordingly.

The witness then further testified that the tax was fixed by the commissioners so that the owners could come forward and pay it
128 about the 14th of Sept., 1863, and they had sixty days after that time to pay the tax. If not paid within that time the property wa' advertised for sale.

Testimony of F. Kauffman.

FREDRICK KAUFFMAN was then sworn as a witness for the defendants, and testified as follows:

I am one of the defendants named in this cause. I have charge of a portion of the property involved in the suit, which has been taken for a cemetery, containing about 200 hundred acres, surrounded by the cemetery walls. This is called the Arlington National Military Cemetery.

I am acting under the direct orders of the depot quartermaster of the United States, and I am there in no other capacity. I do not claim any interest in the land myself. I do not claim any right there except under orders of the officers of the United States.

The property is used as a cemetery by the United States. I have been there occupying it the same way about seven years. I was appointed by the Secretary of War.

Testimony of R. P. Strong.

RICHARD P. STRONG, a witness on behalf of the defendants, then testified as follows:

129 I am one of the defendants in this case. I am in charge of a portion of the property in controversy, the Arlington estate.

I am in charge of these premises by authority of the Secretary of War, by a communication and letter, which is the same as an order.

I am in charge of all of the Arlington estate not included within the

walls of the cemetery. The whole of this is used as a military reservation and fort.

I am the commanding officer of that fort.

I am in command of the Signal Corps of the Army stationed there. The average number of that corps is about 80. At the commencement of this suit there must have been about 150 there. I have been there in command over six years.

These 150 persons were troops of the United States, stationed there. They lived in barracks and in different buildings erected upon the reservation.

About 700 acres of this property is occupied by colored persons,
130 leaving about 200 acres not occupied by them. I have charge of the whole 900 acres. These colored men have permits from me to occupy certain portions.

Four printed forms filled up, of which the following are copies, to wit:

"FORT WHIPPLE, VIRGINIA,
"*May* 11, 1877.

"This is to certify that Rob't Smith is permitted to occupy 5 acres ½ *acres of village land*, of lot No. 14 on the Arlington reservation until December 31st, 1876.

"No rent will be charged for the occupation of this portion of the reservation to that date.

"R. P. STRONG,
"1*st Lieut'ant 4th Artillery, A. S. O., in Charge.*"

"FORT WHIPPLE, VIRGINIA,
"*June 9th*, 1877.

"This is to certify that Abe Hameson is permitted to occupy 5 acres of lot No. 33 on the Arlington reservation until Dec. 31, 1877.

"No rent will be charged for the occupation of this portion of the reservation to that date.

"R. P. STRONG,
"1*st Lieut'ant 4th Artillery, A. S. O., in Charge.*"

131 "FORT WHIPPLE, VIRGINIA, , 187 .

"This is to certify that Tho's Pryor is permitted to occupy 5 acres of lot 36 on the Arlington reservation until Dec. 31st, 1877.

"No rent will be charged for the occupation of this portion of the reservation to that date.

"R. P. STRONG,
"1*st Lieutenant 4th Artillery, A. S. O., in Charge.*"

"FORT WHIPPLE, VIRGINIA, , 187 .

"This is to certify that Burnett Holmes is permitted to occupy 10 acres of lot No. 39 on the Arlington reservation until Dec. 31st, 1877.

"No rent will be charged for the occupation of this portion of the reservation to that date.

"R. P. STRONG,
"1*st Lieutenant 4th Artillery, S. A. O., in Charge.*"

were then shown to the witness, and read to the jury in evidence.
132 He then testified that they were permits issued by him to the parties named therein to occupy the premises described. These

permits are all alike, except that they vary in dates and in the property described and in name.

This is the way in which these colored men occupied the premises, and they occupied them in no other way to my knowledge.

Counsel for the defendants produced a large number of permits, but stated that he did not wish to offer only these four now.

The witness further testified: Many of the defendants named in the declaration were not in possession of the premises, or any part thereof, at the commencement of this suit. I could not tell exactly, but probably about fifty.

Cross-examination:

Q. How do you explain the fact that this permit (showing him one) is dated June, 1877?

Ans. In this way: The party did not obtain his permit until that date. He did not have it when he went upon the premises. A verbal permission was given, and after the occupation ceased
133 this written permit was issued.

In this case the occupation for that period of time had ceased when this paper was given to him.

It was given to him after the occupation ceased for that period, more as a satisfaction to the man himself, as evidence to show that he had the right to be there during that period of time. No claim was made against him.

This suit had not been begun when this paper was given, to my knowledge.

It was not given in connection with this suit in any way. I was appointed in May, 1872. There were then no leases to any of these parties, nor any contracts by which rent was to be paid, but there were verbal contracts by which service was to be rendered in lieu of rent.

The terms of these verbal contracts varied.

The character of these verbal contracts, in a general way, was that each occupant of a particular portion of the land was required to render so many hours of labor at Fort Whipple.

This was up to 1877. No money rent was paid up to the date
134 of these papers; these contracts by which the tenants rendered labor for the occupation of the premises were in force.

The same verbal contracts have remained in force since these papers were issued, and the parties have continued to render personal service to the government.

They have worked so many hours for each acre by a verbal understanding.

The contracts were not all alike.

After the labor was performed the permits were given.

These permits were first given in 1872 & '3, when I first took command.

I have had charge of the entire estate outside of the cemetery, and Mr. Kauffman has had charge of that.

Re-examined by counsel for defendants:

I was in the habit of giving permits or orders for them to hold over after the date expired.

This was the rule with many of them.

It was not always so, but the parties continued to hold over, and permits were given each year to each occupant.

The contract for rendering so many hours of service for each acre

was a verbal one. My course in this respect had the approval of higher authority.

These papers which have been read are renewals of former permits.

I do not know where the permits are of which these are renewals.

They have been in my possession, but are probably now in possession of the parties.

A large number of the defendants, about fifty, were not in possession at the commencement of the suit.

Recross-examination:

I cannot state the names of those not in possession without reference to my papers, which I have in my hands.

I mean by their not being in possession that they were not there by any authority or permit, though probably they were actually there. I cannot say that they were not. I think that Arlington was used as a cemetery as early as 1863.

Testimony of S. B. Corbitt.

SEWAL B. CORBITT, a witness for the defendants, then testified as follows:

I reside in the neighborhood of Arlington.

My house is within about 100 rods of a portion of the estate. I was near the estate at the beginning of the war.

The United States took possession of it on the 24th or 25th of May, 1861, and has occupied it ever since.

Cross-examined:

I mean that persons in connection with the government have been in occupancy.

I believe it was used as headquarters up to the time of its use as a cemetery.

The defendants then rested.

Testimony of I. Brady.

ISAIAH BRADY was then called as a witness for the plaintiff, who, having been sworn, testified as follows, to wit:

I reside at Herndon, Fairfax County, Va. During the winter of 1863 & '4 I was employed by the direct-tax commissioners for Virginia as their clerk and in their office, at the corner of Washington and Prince streets, in Alexandria, where they had their office while they continued here, but during 1863 I was in Accomac County with a portion of the commission.

I was authorized to receive taxes before the expiration of the sixty days, but after that only upon specific directions. I do not know what the practice of the commissioners was before the 11th day of January, 1864, the date of the sale of this property, as to receiving taxes upon property advertised for sale from other parties than the owner in person, if I am confined to the dates between advertisement and sale, because I was not here a portion of the time.

Counsel for plaintiff then offered to show by this witness the practice of *of* the commissioners as to receiving taxes upon advertised property from parties other than the owner in person before the sale, after the 11th day of January, 1864, to be followed by proof on the part of the plaintiff that the practice in this respect was the same before the 11th

day of January, 1864, as it would be shown by this witness was the practice subsequent to that time.

To this the defendants, by their counsel, objected, on the grounds that the practice of the commissioners in this respect before the sale was immaterial; that if material, the practice after the sale was immaterial, and would tend to improperly influence the jury; and that all evidence upon this subject should be confined to the period before the sale.

But the court overruled the objection, and ruled that it was competent for the plaintiff to prove the practice generally, without
138 reference to dates, provided that the plaintiff should afterwards prove that the same practice prevailed within the period of time between the advertisement and sale of this property.

To this ruling the defendants, by counsel, excepted, which exception was duly entered of record, and is certified accordingly.

Whereupon the witness further testified, in answer to interrogatories by counsel for plaintiff, that the practice of the commissioners was that after property had been advertised for sale they would not from that time until the sale receive payment of taxes upon property so advertised, except when offered or tendered by an owner or a party having an interest in person; that if tendered by any other the taxes were refused. No one but a person having an interest in the property was allowed to pay the taxes, and such payment was required in person.

He then further testified: I returned from Accomac shortly before the sale on the 11th day of January, 1864. I could not state how many days.

I do not know of any particular instance in which, prior to this
139 sale, the commissioners refused to receive the taxes on the ground that they were not offered by the owner in person. There was no variation in this practice any time after the property had been advertised for sale, so far as I know.

Cross-examined:

I went to Accomac with Mr. Watson, one of the commissioners, I think, about October, 1863. Mr. Watson and I came back together just previous to the sale, and he remained here with me as long as I was in the office, which was for a considerable period after the sale.

I cannot specify any particular instance when anybody offered to pay the taxes and was refused because he was not a party in interest, either before the 11th of Jan'y or after, or at any time.

Testimony of W. C. Yeaton.

WILLIAM C. YEATON was then sworn on behalf of the plaintiff, and testified as follows:

I reside in Alexandria, and am an attorney at law. I was here during the winter of 1863 & '4; I had occasion to go to the office of the direct-tax commissioners in this city frequently during the winter on business with the commission.

140 Question. By plaintiff's counsel.) Did you learn from them what their practice was in respect to the collection of taxes on property after the same had been advertised for sale?

(To this the counsel for defendants objected on the grounds that it was not competent to prove such practice by declarations of the commissioners, except when such declarations are made in some case before them, so as to be a part of the transaction itself; that *that* there is no

evidence of any written or printed rule upon the subject, or anything in the way of a recorded official act; that the commissioners were best qualified to testify upon this subject; and that the subject of the enquiry was immaterial.

The court overruled the objection, and defendants, by their counsel, excepted to such ruling at the time, which exception was duly entered of record and is certified accordingly.)

Question. (By plaintiff's counsel.) What was the statement made to you by the commissioners as to their practice upon this subject?

(Objected to by counsel for defendants on the same grounds as
141 the previous question.

Objection overruled, and exception to such ruling taken by counsel for defendants.)

Question. (By plaintiff's counsel.) What did they say to you on this subject?

Ans. My object in going there was to pay some taxes for myself and for some friends who were absent. I tendered the money. That is the only case where I did. That seemed to establish the rule.

They refused to receive it on the ground that they were not allowed to receive it unless from the owner, or some one having an interest.

This was in the case of Mrs. Beverly. I was acting under a power of attorney for her to manage the property. I labored very hard and called frequently; I think up to the very day of sale.

The property was very valuable, worth twelve or fourteen thousand dollars, and was sold afterwards under the act.

I do not remember any other case in which I tendered payment of taxes.

I was prevented from paying in other cases because I felt sure that it would not be received from me any more than in the case of Mrs. Beverly.

142 Cross-examined:

I cannot remember the time I went to offer the tax. It was before the sale. I made a tender of the money, but do not remember whether to Mr. Hawxhurst or to Mr. Foster. There were two or three there in the office. I cannot state whether the property was sold at the first sale or subsequently, nor whether I went to make the tender before or after the 11th of January, 1864.

My power of attorney was a general one, given at about the beginning of the war, and authorized me to do what was necessary to preserve the property, including the payment of taxes. I think I applied to the commissioners very soon after I saw the property advertised.

Testimony of Jno. W. Burke.

JOHN W. BURKE, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

I resided in this city during the winter of 1863 and '4.

Q. By plaintiff's counsel.) What was the practice of the direct-tax commissioners as to receiving taxes upon land advertised for sale?

(Objected to by counsel for defendants upon the grounds here-
143 tofore stated. The court overruled the objection, and defendant's counsel then and there excepted, which exception was duly entered of record and is certified accordingly.)

Ans. I never offered to pay any one's taxes but my own except in one case. That was in the case of my brother-in-law, Mr. Thompson, of Bal-

timore. In that case the commissioners refused to receive the taxes unless tendered by Mr. Thompson in person.

This refusal was made by one of the commissioners, not Mr. Hawxhurst. I wrote to Mr. Thompson, and his wife afterwards came, but they would not receive the taxes from her. I remember that Mr. Hawxhurst remarked at the time that the object of the law was to prevent Jefferson Davis from paying taxes on property left on this side of the line without presenting himself in person.

Cross-examination:

The taxes were not paid and the property was sold.

I cannot tell whether it was before or after the 11th of January that I went to see the commissioners.

I think there were three commissioners present. I am certain
144 that there were three officials, and Mr. Brady was not one.

Testimony of R. Fendall.

REGINALD FENDALL then testified, on behalf of the plaintiff, that he was the administrator of his father, Philip Fendall, who died in the year 1868; that he had made diligent search for a letter said to have been written to his father in the latter part of 1863, in relation to payment of taxes on the Arlington estate, by Wm. L. Marshall, but had not been able to find it. His father had been a lawyer, was at one time U. S. district attorney, and was a Union man residing in Washington during the war.

The deposition of WILLIAM L. MARSHAL, now a resident of California, was then read by the plaintiff's counsel, in which he testified as follows:

During 1863 and the early part of 1864 I was in the city of Baltimore. My attention was called by advertisement in the newspapers to the fact that the United States proposed to sell the Arlington estate for taxes said to be due. A short time before the proposed sale, as I was not able to go to Virginia to pay the taxes, I wrote to Philip Fendall, of Washington, to draw on me for the amount of the taxes and
145 pay the same. A few days after I received a letter from him. Mr. Fendall is now dead. His letter is not now in my possession or power, nor have I any copy of the one I wrote to him. I am not in the habit of preserving letters, and am extremely careless with my papers. I presume Mr. Fendall's letter to me is destroyed, as I destroyed all my papers, except a few of the first importance, when I removed to California. I have made examination among all my remaining papers, and everywhere where the letter in question might possibly be, and have not been able to find it. I cannot fix the date at which I wrote Fendall, but it was some short time, some weeks, before the time of sale.

I received his reply in a few days thereafter. The purport of my letter was that I had observed in the newspapers that the United States was about to sell, on account of unpaid taxes, the Arlington property and the adjoining land; that I was unable to go to Alexandria for the purpose of paying the same; that he would oblige me very much if he would draw on me for the amount of taxes due and pay them, so as to prevent the sale.

146 My motives for attempting to pay the taxes and prevent the sale was that I had married the sister of Robert E. Lee, and was very much attached to him and to Mrs. Lee, the owner for life of the

roperty in question. Philip Fendall was the first cousin of Robert E. ee, and was his intimate friend.

The above deposition was read subject to objection taken to it on the ground of its immateriality; which objections were overruled by the court, and to which ruling the defendants, by counsel, then and there excepted, which exception was duly entered of record and is certified accordingly.

Testimony of J. Tacey.

JEFFERSON TACEY was then recalled as a witness for the plaintiff, and testified as follows:

I resided in Alexandria during the war. I had frequent occasion to visit the office of the direct-tax commissioner here.

Q. (By counsel for plaintiff.) Do you know what was the practice of the commission in Alexandria in respect to the collection of taxes upon property after it had been advertised for sale?

147 (To this question counsel for defendants objected upon the grounds before stated as to similar questions; which objection was overruled, and to which ruling the counsel for defendants excepted at the time, which exception was duly entered of record and is certified accordingly.)

Ans. They refused to receive the taxes from any one but the owner or a party interested in the property; that is, from the owner in person or a party in interest in person.

It has always been my conviction that they would not receive it from the hands of a friend or an agent.

That conviction was produced from conversations which occurred in the office of the tax commissioners, and from a general report in the community.

These conversations were with the commissioners, or between the commissioners and myself, or between the commissioners and other parties in my presence.

(Counsel for defendants then further objected to this testimony on the ground that it is hearsay; that it purports to give the declara-

148 tions of the commissioners not made in cases actually occurring at the time.

The court overruled the objection, and ruled that it was competent for the purpose of establishing the rule, and then the plaintiff could follow it up by showing that it was generally known.

To this ruling the defendants, by their counsel, excepted at the time, which exception was duly entered of record and is certified accordingly.)

The witness then further testified, in answer to interrogatories by counsel for plaintiff:

I believe it was generally know in the community that this was the established practice of the commission.

It was a matter of comment and observation in the community, a subject of general discussion, and in some cases was severely criticised.

I believe these conversations I heard with the commissioners were both prior and subsequent to the first sales, made on the 11th day of January, 1864.

Cross-examination:

My conviction is that this was the practice of the commissioners before the 11th of January, 1874; that is my recollection.

149 I cannot specify any instance of my own knowledge. I cannot give any specific date of any conversations with the commissioners upon the subject, nor any specific conversations. They were of a general character. I cannot recall any particular instance. It is a conviction merely of my mind. I have no personal knowledge of any such occurrences having taken place.

No offer was ever made in my presence that I can recollect.

All the information I have upon the subject is from conversations with the commissioners directly myself, and conversations heard by me between the commissioners and others.

I cannot name any person that I heard speak upon the subject, nor can I bring to my mind any particular time that it was spoken of during that winter, or any interview with any one.

I have an impression that I talked of it with Wm. C. Yeaton, but cannot fix any time or locality. I can give no names now. My impressions are so indistinct that I hesitate to say, though I think there were others. My impressions are not indistinct as to facts,
150 but as to specific times and dates.

Testimony of R. Johnson.

REUBEN JOHNSON was then called on behalf of the plaintiff, and, being sworn, testified as follows:

I have always resided in Alexandria, except at short intervals, and was here during the war.

I was well acquainted with Philip Fendall, of Washington. He was a lawyer of very high standing. I remember of his being here prior to the sale of the Arlington estate on business connected with that estate. He called at my office some time in the latter part of 1863, or beginning of 1864. I think it was late in 1863. My memory does not serve me very well on that point. We went to the commissioners' office, on the corner of Prince and Washington streets. The object was to tender the taxes or pay them.

Mr. Fendall tendered to one of the commissioners, I think Mr. Foster, the taxes then due for which the property had been advertised, and Foster said they could not receive them, and they were refused. I think he said the law prohibited them from doing it.

151 Q. Are you positive as to the commissioners then in the office?

Ans. I am, sir, very positive; but the fact is it is almost 20 years since then.

Q. What commissioners were there?

Ans. I think Mr. Hawxhurst and Mr. Foster. Mr. Watson was not there, I am positive. I went to the office frequently, and in the earlier stages Mr. Watson was there all the time. Mr. Foster came in afterwards.

Q. Do you know whether it was before the sale of the estate?

Ans. Undoubtedly; it was prior to the sale two or three weeks.

Q. And the taxes were refused upon what ground?

Ans. On the ground that the commissioners had no authority to receive them, and they were refused from everybody except the parties in interest. I think this was the practice established by the commissioners in respect to the collection of taxes on property advertised for sale. I went there in two instances of this kind—the Arlington estate and the property of Mr. Thompson, the brother-in-law of Mr. Burke—and in both cases the taxes were refused on the ground that pay-
152 ment could be made only by the party in interest. This was

their construction of the law. This practice was generally known in the community, and was the subject of remark and criticism, though I usually defended their course. I heard Mr. Yeaton and Mr. Fendall speak of it.

Cross-examination:

The reply made by Mr. Foster to Mr. Fendall was that the party in interest must appear and pay the taxes. I am confident that Mr. Hawxhurst was present at the time. Mr. Brady was there, and some bystanders, I think, when I went on the business of Mr. Thompson. I think two commissioners were there, though I cannot recall Mr. Foster in connection with that.

I have no recollection of Mr. Boreman's being there. Mr. Fendall did not exhibit any money. He was met by the refusal, and there was no necessity for producing the money. I infer that he had the money, or he would not have gone there.

153 I have no recollection of his telling the commissioners that he had any money with him. He said he came for the purpose of paying the taxes on that property. Mr. Foster was the one who replied to him that they could not receive money now except from the actual owner. Nothing was said about taking the oath to support the Constitution, that I can remember.

As nearly as I can recollect the conversation, it took place as follows: Mr. Fendall went in and walked up to the end of the room where Mr. Foster was standing, and I believe addressed him personally, stating that he came to pay the taxes upon the Arlington property. Mr. Foster's answer was, "We cannot receive it from you unless you are a party in interest," or words to that effect, and Mr. Fendall said he was not a party in interest, and then we both turned about and came away. That is all that occurred, so far as I can remember.

Redirect examination:

I was at the office during the winter a good many times. I am positive in my recollection that this transaction of Mr. Fendall was prior to the sale. I cannot be mistaken in regard to that. I may be mistaken as to the commissioners who were in the office. It is pos-
154 sible I was mistaken as to Hawxhurst, but not as to Mr. Foster.

Testimony of E. W. Janney.

EDWARD W. JANNEY, a witness on behalf of the plaintiff, was then sworn, and testified as follows, to wit:

I came to Alexandria in December, 1863, for the purpose of practicing medicine. When I first came here I knew Mr. Hawxhurst. Late in December, 1863, or early in January, 1864, I went into the office of the commissioners to see Mr. Hawxhurst. Their office was then on the corner of Washington and Prince streets.

Mr. Hawxhurst was the only one I then knew. I became acquainted with Mr. Watson some time afterwards. The first time I called to see Mr. Hawxhurst, while I was there, a gentleman whose name I do not know, but think it sounds like Fendall, came in and went to one of the gentlemen, I do not remember who it was, and said he noticed an advertisement in the newspapers that the Arlington property was to be sold, and that he was willing to pay the taxes on it. They said they were not willing to receive the taxes, because it did not belong to him, but that it belonged to Robert E. Lee. He said it belonged to

155 Mrs. Lee, and came from Mr. Custis. I afterwards found out that he was a lawyer from Washington.

I do not think that Mr. Hawxhurst was in there at first, because I went in to see him. If he had been there I would have transacted my business and passed out soon. I do not know who the officials were. I went in to see Mr. Hawxhurst about getting an appointment as vaccine agent of the State government. I got the appointment. It was dated February 5th, 1864. I am sure several weeks elapsed between the time I saw Mr. Hawxhurst on this occasion and the date of my appointment. I remember distinctly that the gentleman said that he came to pay the taxes on the Arlington property, which he had seen advertised for sale.

I was afterwards employed by the Government of the United States as an attending surgeon. I was then a Union man and am yet.

Cross-examination:

My best impression is that Mr. Hawxhurst was not present at the interview with Mr. Fendall. I went there to see Mr. Hawxhurst,
156 and while waiting for him this conversation took place.

I would not like to say it was with Mr. Foster, though I was afterwards introduced to the commissioners and one was named Foster. I am not certain that Mr. Hawxhurst came in at all that day. I saw him that day, but do not remember where I saw him.

The reason that I think that this conversation took place in the latter part of December, 1863, or early in 1864, is that it took some time to bring about my appointment; this is the only reason.

I think I can say positively that it was before the 11th of January.

The circumstance is impressed upon my memory that Mr. Fendall said that he had seen the advertisement, and that he desired to pay the taxes.

Testimony of W. J. Boothe.

WILLIAM J. BOOTHE, a witness called on behalf of the plaintiff, having been sworn, testified as follows:

I reside in Alexandria. I resided here during the war. I was a friend of Mr. & Mrs. Fowle. I made an offer to pay the taxes to the commissioners upon the property of Mrs. Fowle. I made the tender in
157 the presence of Mr. Hawxhurst and his associates at their office, and was told simply that they would not receive the taxes from me.

I am not able to answer why they would not receive them from me.

This was before the tax sale. I had no interest in the property whatever. I went there simply as a friend. I was ready to pay the tax and charges.

Cross-examination:

I made this offer to Mr. Hawxhurst, and there were two or three gentlemen there whom I did not know. They appeared to be acting as clerks. I do not know Mr. Foster or Mr. Watson. I do not know the precise time that I went there. It was soon after the property was advertised, as soon as I knew it was necessary. I do not know when the property was sold.

Testimony of J. C. McQuinn.

JOHN C. MCQUINN, a witness called on behalf of the plaintiff, having been sworn, testified:

I was at Arlington during the entire war. I was manager for Mrs. Lee three years before the war, and when Mrs. Lee left she placed me in charge of the place, of the servants, and to do the best I could, and I remained there during the war. I cannot state at what time the
158 soldiers were first buried at Arlington. I think in 1863 they commenced first on the north line, and they came to me to know the best place. I named a place beyond that, but they wanted some place on the estate.

Cross-examination:

The United States took possession of the estate in May, 1861. I cannot tell how many graves there were in 1863, nor whether more than an acre was occupied by them.

Re-examination:

When the government took possession in 1861, they took possession of all beyond the road. I held possession of the farm until the first Bull Run battle. The place was easily divisible into lots.

The plaintiff then read in evidence the advertisement of the commissioners, which showed that the property spoken of by the witness Boothe was advertised to be sold on the same day as the Arlington property, and also that the Abingdon estate, formerly owned by Mr. Hunter, was advertised to be sold on the same day. These advertisements are contained in the Virginia State Journal of November & December, 1863, and January, 1864.

It appeared from this advertisement that the sale of the Arling-
159 ton property was first inserted November 21st, 1863.

Neither the advertisement nor the paper showed that the Beverly property spoken of by the witness Yeaton, or the Thompson property spoken of by the witness Burke, was advertised prior to January 11th, 1864.

The plaintiff then rested.

The defendants, to further maintain the issue on their part, then read in evidence certified copies of the appointment of the tax commissioners received from the Treasury Department.

App't of A. L. Foster.

The following is a copy of the appointment of A. Lawrence Foster, to wit:

Abraham Lincoln, President of the United States of America, to all to whom these presents shall come, greeting:

Know ye that reposing special trust and confidence in the integrity, diligence, and discretion of A. Lawrence Foster, I have nominated and, by and with the advice and consent of the Senate, do appoint him a tax commissioner for the district within the State of Virginia, and do authorize and empower him to execute and fulfil the duties of that office according to law, and to have and to hold the said office,
160 with all the rights and emoluments thereunto legally appertain-

ing unto him, the said Foster, during the pleasure of the President of the United States for the time being.

In testimony whereof I have caused these letters to be made patent, and the seal of the Treasury Department of the United States to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and sixty-four, and of the Independence of the United States of America the eighty-eighth.

By the President:

ABRAHAM LINCOLN.

S. P. CHASE,
Secretary of the Treasury.

The date of appointment of the other three commissioners was shown to be March 7th, 1863.

Testimony of J. Hawxhurst.

JOHN HAWXHURST, being then recalled as a witness on behalf of the defendants, testified as follows:

Q. (By counsel for defendants.) Do you know at what time Mr. Foster assumed the duties of his position as one of the commissioners?

161 Ans. I have seen memoranda that fixes it on the 28th day of January, 1864.

Q. Prior to the sale of the Arlington estate who acted as commissioners in this city?

Ans. My recollection is that all three commissioners were here for a few days at first, Mr. Boreman, Mr. Watson, and myself.

Q. What time?

Ans. After the fixing of the tax.

Q. What month was that?

Ans. That was Sept. 14th, I think.

Q. How long after that?

Ans. Two or three days. Then Mr. Watson and the head clerk went to Accomac to collect the tax there, and Mr. Boreman got a leave of absence.

Q. Were you here acting alone when this property was advertised?

Ans. I was; Watson returned here a comparatively short time before the sale.

Q. A few days before the sale?

Ans. I should say a few days.

Q. Subsequently to that time did Boreman act as one of the commissioners?

Ans. Yes, sir.

Q. Boreman was here at the date of the sale, was he not?

Ans. I think he got here a day or two before Watson.

162 Q. Can you give any instances prior to that sale in which taxes were tendered to you by parties not having an interest in the property, and refused by you on the ground that they were not the owner in person?

Ans. Well, I cannot say of my own recollection that there was, but the papers show that such was the case.

Q. In how many instances?

Ans. Well, I could not remember in fact from my own recollection;

I do not remember any instance, but it is evident from the memorandum that I have examined that such was the case.

Q. In how many instances, then?

Ans. I cannot find any but one. There is some confusion in my mind in reference to that. It seems to me that the property of Fowle, and as my recollection is that it was at a later time, it seems to me that it was not advertised at the first sale.

Q. To the best of your recollection, when Boothe came to you it was in reference to that property of his which was subsequently sold?

Ans. That is my recollection, but it does not appear to be the
163 case. I heard his testimony, and I have no inclination to doubt; he certainly came to me in reference to some property, as I recollect.

Q. Was that prior or subsequent to the sale?

Ans. I could not say; I should say it was later from my recollection, but from the memorandum it seems that the property was advertised in the first instance.

Q. Was the sale of a number of pieces of property advertised at that time adjourned until a subsequent time?

Ans. Yes, sir; there was something of that kind.

Q. Do you remember how many?

Ans. No, I do not; I think some parties made application to pay the taxes, and we adjourned the sale, or withdrew those pieces from the sale.

Q. Have you any recollection of Mr. Fendall appearing before the board of commissioners?

Ans. I have not.

Q. Have you any knowledge of it?

Ans. No, sir.

Q. Did you ever hear of it?

Ans. Never heard of it until a short time ago.

164 Q. Have you any recollection about the Beverly property?

Ans. Yes, sir; I have some.

Q. As to Mr. Yeaton's appearing in reference to it?

Ans. Yes, sir; I remember that.

Q. When was that?

Ans. I think it was about the time of the second sale.

Q. Was it subsequent to the 11th of January?

Ans. Yes, sir; I think it was.

Q. Did Mr. Yeaton complain of your action in regard to that?

Ans. He seemed to be very anxious to pay the taxes; he did not seem to blame us; he rather stated distinctly that he did not see how we could receive it under the law.

Q. Do you remember this case of the Thompson property?

Ans. No, sir; I do not seem to remember that; I have no recollection about it.

Q. You do not remember when it was advertised, then?

Ans. No, I could not say I do; it seems to have slipped my memory entirely.

Q. Was any rule in regard to receiving the payment of taxes except from the owner in person published in any paper?

165 Ans. I never knew that it was.

Q. Was any public notice given of it except as you mentioned it to parties that appeared?

Ans. I have no knowledge of any other notice.

Cross-examination:

Q. Do you recollect the sale of the Abingdon estate?

Ans. Yes, sir.

Q. Do you recollect that there was a tender of the taxes in that case, and that it was refused; I mean in the case of the Hunter property?

Ans. Yes, sir; there was an offer there and the offer was refused.

Q. Did that sale take place on the same day with the Arlington estate?

Ans. I do not remember.

Q. This is your advertisement here in the Virginia State Journal, in December, 1863?

Ans. Yes, sir.

Q. You say you recollect the fact of Boothe coming and making an offer in some case?

Ans. Yes, sir; I remember that distinctly; my recollection was that his visit was on the George D. Fowle property.

166 Q. It was Mrs. Fowle's property on Prince street that Boothe saw about; that was sold on the same day?

Ans. It was probably sold on the same day, but the advertisement is not conclusive.

Q. But the presumption is that it was sold on that day?

Ans. Yes, sir.

Q. The construction which the commissioners put upon the law was that you had no right to receive the taxes after the advertisement of the property except from the owner in person?

Ans. Yes, sir.

Q. And you acted upon that construction from the start?

Ans. Yes, sir; from the start.

Q. You have no recollection of this call by Mr. Fendall?

Ans. No, sir.

Q. How does your recollection on that point compare in point of reliability with your recollection as to the time when you went out of office; can you trust it for that purpose?

Ans. I can trust it as to facts.

Q. You say that for most of the time prior to the Arlington sale you were the commissioner in charge here?

Ans. For most of the time.

167 Q. You were not constantly and continually in the office every day and throughout all the office hours during that time?

Ans. I might have missed some, but I do not remember. I could not have been here always, of course.

Q. Had you any representatives there when you were not there?

Ans. No, I do not think I had. I do not remember to have appointed any person to receive taxes except the regular clerk.

Q. Do you recollect whether Mr. Hunter was ever clerk there?

Ans. Yes, sir; a long time.

Q. Did he go off with the commission?

Ans. I could not say after the time of his discharge.

Q. Did he go to Accomac with the commission?

Ans. He was not in office then. We had only authority to appoint one clerk at that time.

Q. Was not Mr. Foster in and about the office for a very considerable length of time, and very frequently prior to the time when he entered upon the duties of his office?

Ans. I do not think I ever saw him there except within a day or two before.

168 Q. Do you know the date that Mr. Foster was nominated by the President to the Senate?

Ans. I can give my recollection.

Q. I do not mean his commission, but I refer to his nomination?

Ans. It was done very quickly. There was a break in the commission, and there was some doubt as to whether it should remain in that shape. He was appointed and got his commission, and gave a temporary bond. The whole thing occurred very quickly. I could not give the date exactly. He was in the office before he filed his bond, perhaps two days. He gave a temporary bond at first.

Q. Was it the practice of the commissioners immediately upon compliance with the terms of the sale by a purchaser to give him a certificate?

Ans. We usually made a memorandum. In most cases we required ten per cent, but that practice was dropped afterwards.

Q. In the case of the Bennett sale the certificate bears date the day of the sale?

Ans. It was then made out. All the first sales were made out very shortly, within a day or two after the sale. Subsequently much longer time elapsed before we filled up the certificates.

169 Q. This property was sold on the 11th of January, 1864, and the certificate was dated two years afterwards. Why was that delay made?

Ans. We made out a certificate and it was not satisfactory.

Q. Have you refreshed your memory as to the time you retired from office?

Ans. Yes, sir. It was April 30th, 1867.

Redirect examination:

Q. Of your own recollection, then, you do not remember but one instance where taxes were tendered by parties other than the owner in person and refused by you previous to the 11th of January, and that was the Abingdon property?

Ans. I do not of my own recollection; there were very few refusals up to that time, and that is the only one I remember.

Q. Was there much application to pay taxes before this sale?

Ans. There appears to have been a number paid. Since I have refreshed my memory quite a number appear to have been paid in that interval.

It was then admitted by counsel for the respective parties that the plaintiff was a general in the Confederate army from about 1861
170 during the war, and that he did not return here until after the close of the war. It was further admitted that Mrs. Lee was the wife of Robert E. Lee, and was with him during that time within the Confederate lines.

And thereupon counsel for the respective parties announced that they had closed the taking of testimony in the cause.

Counsel for defendants then moved the court to strike out from the evidence that part which tended to prove a tender of taxes by any party other than the owner in person after the property was advertised and before the sale, on the grounds that such evidence was immaterial and incompetent; which motion was denied by the court, to which ruling defendants, by their counsel, then and there excepted, which exception was duly entered of record and is certified accordingly.

Counsel for defendants then moved the court to strike from the evidence such portions as tended to show that it was the uniform practice

of the commissioners not to receive taxes from parties other than owners or parties having an interest, after advertisement and before the
171 sale, on the grounds that such evidence was immaterial and incompetent; which motion was denied by the court, to which ruling the defendants, by their counsel, then and there excepted, which exception was duly entered of record and is certified accordingly.

Instructions, prayers for.

"If the jury believe from the evidence that the property in controversy, or any definite portion thereof, was in the possession of the United States through some of its officers or agents charged on behalf of the United States with the control of the property, coupled with its actual possession at and before and since the commencement of this suit; that such property, or definite portion thereof, was at such time used by the United States in the exercise of its sovereign powers as a national cemetery, or as a fort and reserve connected therewith; that the said property was in January, 1864, advertised for sale for default of payment of taxes under the act of June 7th, 1862, entitled 'An act for the collection of direct taxes in insurrectionary districts within
172 the United States,' and for other purposes, and the amendments to said act of February 6th, 1863, that at said sale the said property was struck off to the United States by said commissioners; that the certificate of sale produced by defendants was made by said commissioners; that the same was delivered to the proper officers of the United States at or about its date, and that the United States has made no assignment, transfer, or conveyance of the said property, or definite portion thereof; that the said defendants make no claim of right to the occupation of said property except by virtue of orders of the War Department of the United States, and no claim of right except under authority of such orders, and of written permission of the officer in charge, and a verbal agreement to render a certain number of hours' service for each acre of land occupied by each person, then the verdict as to such property so used and occupied must be for the defendants;"

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record, and is certified accordingly.

173 And be it further remembered that the defendants then asked the court to instruct the jury as follows:

"If the jury believe from the evidence that a portion of the property in question not occupied by the United States as a cemetery, and not occupied by any of the defendants other than R. P. Strong, has been for a period of five or more years, and up to and including the time of the commencement of this suit, used by the Government of the United States as a fort or a military reservation, or as a military fort and reserve connected therewith; that the said defendant R. P. Strong at the commencement of the suit occupied the same as a military officer of the United States, and under orders of the War Department of the United States only, and as the commander of soldiers and officers of the United States occupying the property with him, and was charged with the possession and occupation of the same as such officer, and only as such; that during this period the United States has claimed to hold the same under a certificate of sale made by the commission-
174 ers appointed under the act of Congress of June 7th, 1862, entitled 'An act for the collection of direct taxes in insurrectionary districts,' and for other purposes, and amendments to said act, which

certificate of sale is proved in this cause; that the same was executed by the said commissioners and delivered to the proper officers of the United States; that since then there has been no conveyance, assignment, or transfer of the said property, or any part thereof, by the United States; that said Strong has made no claim of right to the occupation of said property on his own account, or on account of any authority except in obedience to the orders of the War Department of the United States as a military officer, and has been in the occupation thereof only in obedience to such orders; that on or about 1872 an order was made by the Secretary of War that all that part of the said estate outside of the walls of the cemetery be considered a military reservation *pre*taining to Fort Whipple upon said premises and under the immediate charge of the commanding officer of that fort, and that such order has since that time remained in force, then the jury must find a ver-
175 dict against the plaintiff for such portion of said property as may be believed by them from the evidence to have been occupied by said R. P. Strong only and in the manner herein described."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record, and is certified accordingly.

And be it further remembered that defendants then asked the court to instruct the jury as follows:

"If the jury believe from the evidence that any of the defendants, at the commencement of this suit, occupied distinct parcels of the property in controversy in severalty, under permission of the officer in charge of the military fort or reservation alone, that they make no claim of right to the occupation thereof, except by virtue of such permission, and a verbal agreement between the officer in charge and such person to render a certain number of hours' service for each acre of land occupied by them; that said officer in charge is and was at the commencement of the suit a military officer of the United States,
176 and placed in charge in obedience to orders from the War Department, and having or claiming no right of occupation or possession or authority in relation thereto, except by virtue of such orders; that said property was advertised for sale, for default of payment of taxes, by the commissioners appointed under the act of Congress of June 7th, 1862, entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States,' and for other purposes,' and amendments to said act, and the certificate of sale produced by defendants was made by the said commissioners, and that the same was delivered to the United States on or about the date thereof, and has since been held by them; that the United States has not made any assignment, transfer, or conveyance thereof; that the property outside of the walls of the cemetery was, on or about 1872, directed by the War Department to be used as a military reservation *pre*taining to Fort Whipple, upon the said premises and under the immediate charge of the commanding officer of said fort, and that such order has since that time remained in force, then the verdict of the jury must be for each and every one of said defendants holding the said distinct par-
177 cels of property in severalty, as herein described, and against the plaintiff for the land so held by each and every one of said defendants."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

And be it further remembered that defendants then asked the court to instruct the jury as follows:

"If the jury believe from the evidence that a portion of the property in question, consisting of about 200 acres, is used by the Government of the United States as a national cemetery for the burial of deceased soldiers and sailors, and has been so used for a period of ten or more years; that the United States has during this period claimed to hold the same under the certificate of sale produced by the defendants in this cause; that since the date of such sale there has been no conveyance, assignment, or transfer of said property by the United States; that no one of the defendants was in the occupation of said portion of said property at the commencement of this suit except Fredrick
178 Kauffman; that he was in such occupation only as superintendent of said portion used as a cemetery, as an agent or officer of the United States only, and charged in behalf of the United States with the control of the property, and having possession thereof only as such agent or officer, and acting under the directions of the Quartermaster-General or the War Department of the United States only in such act of possession or occupation, and making no claim of right to the possession of such cemetery lot on his own account, or on account of any authority, except as superintendent as aforesaid, and that he is and has been in the occupation of said premises only in obedience to orders and directions of the War Department, or by its authority, then the jury must find a verdict against the plaintiff for such portion of the premises herein described."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

And be it further remembered that the defendants then asked the court to instruct the jury as follows:

179 "If the jury believe that the owner of said land in controversy did not, on or before the day of sale, appear in person before the board of commissioners and pay the amount of the tax upon said land, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than *than* two-thirds of the assessed value of said lot or parcel of ground; that the said tract of land was selected under the direction of the President of the United States for government use, for war, military, naval, revenue, charitable, educational, or police purposes, and that the President directed the said commissioners to bid in the said property at said sale, then the said commissioners were at such sale, if the jury believe the same was lawfully made, authorized to bid on the said property, under the direction of the President, for and to strike off the same to the United States."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

180 And be it further remembered that at the request of the plaintiff the court instructed the jury, contrary to the defendants' objection, as follows:

1st. "If the jury believe from the evidence that Philip R. Fendall, for and on behalf of the owner of the property in controversy, prior to the sale thereof by the tax commissioners on the 11th day of January, 1864, offered to pay the amount charg'able on said property, under the act of Congress entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other pur-

poses,' approved June 7th, 1862, and the acts amendatory thereof; and that said offer was refused by said commissioners, because it was not made by the owner in person; then said sale was unauthorized, and conferred no title upon the purchaser."

To the giving of which instruction the defendant at the time excepted, which exception was duly entered of record, and is certified accordingly.

And be it further remembered that the court at the request of the plaintiff and contrary to the objection of defendants further instructed the jury as follows:

181 2d. "If the jury believe from the evidence that the commissioners, prior to January 11th, 1864, established, announced, and uniformly followed a general rule, under which they refused to receive on property which had been advertised for sale, from any one but the owner or a party in interest, in person when offered, the amount charg'able upon said property, by virtue of the said acts of Congress, then said rule dispensed with the necessity of a tender, and in absence of proof to the contrary the law presumes that said amount would have been paid, and the court instructs the jury that upon such a state of facts the sale of the property in controversy, made on the said 11th day of January, 1864, was unauthorized and conferred no title on the purchaser."

To the giving of which instruction the defendant at the time excepted, which exception was duly entered of record, and is certified accordingly.

The court then, at the request of the defendants, gave the following several instructions to the jury:

182 1st. "The certificate of sale introduced by the defendants is evidence of the regularity and validity of the sale, and as such evidence can be affected only by establishing the fact that the property in controversy was not subject to taxes, or that the taxes thereon had been paid previous to the sale or that the property had been redeemed according to law."

2d. "The certificate of sale produced by the defendants is prima facie evidence of the regularity and validity of the sale, and the statements therein contained are to be taken as true, except as to those which may be shown to be untrue by evidence produced in this cause."

3d. "The certificate of sale cannot be invalidated by any practice of the commissioners not to receive taxes upon property after advertisement and before sale, so far as such practice was in force, after the date of the sale of this property, and no such practice can be considered by the jury as affecting the validity of such sale, unless it was in force between the advertisement and the sale of the Arlington property."

4th. "The practice of the commissioners not to receive taxes except from the owner in person, after the advertisement and before the sale, after the date of the sale of this property, cannot be consid-

183 ered as sufficient evidence of such practice before such date."

5th. "Any rule or practice of the commissioners not to receive taxes from any one but the owner or owners of the lands charged with the taxes in person, after the advertisement and before the sale, cannot be regarded as material to the merits of this case, if the jury shall believe from the evidence that it was not in consequence of such rule or practice that the taxes on the property in controversy were not paid or tendered prior to the sale."

6th. "The burden of proof is upon the plaintiff to establish the fact that the tax commissioners before the sale of this property made a general rule not to receive taxes except from the ow .er in person after

the advertisement and before the sale; and if the jury believe that only two such instances occurred before the sale of this property, and if there is no evidence that the other two commissioners or either of them ever acted under such rule or practice except Commissioner Hawxhurst, or that they or either of them ever concurred in such action before the sale of this property, then the said two instances
184 in which Mr. Hawxhurst alone acted do not establish the said practice by the board of commissioners before the sale of this property in a sufficient manner to render the certificate of sale of this property invalid."

7th. "In order to establish a general practice or rule the board of commissioners not to receive taxes except from the owner in person, after advertisement and before sale; before the date of the sale of the property in controversy, the jury must find from evidence produced on this trial that a majority of such board adopted such practice, or rule, or concurred therein, before the date of the sale of this property, and in the absence of proof to the contrary the law presumes that a majority of such board did not adopt such practice or rule, or concur therein before such date."

8th. "There is no evidence in this case tending to show that the land in controversy was not subject to taxes under the act under which sale purports to have been made, nor that said property has been redeemed under the provisions of said act."

185 And be it further remembered that the defendants then asked the court to instruct the jury as follows:

"Any rule or practice of the commissioners not to receive taxes from any one but the owner or owners of the lands in person, did not absolve the owner or owners of the land in controversy from paying or offering to pay, either in person or by an agent, the amount of the taxes fixed thereon by the commissioners (within the time prescribed by law) in order to discharge the land from the tax."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

And be it further remembered that the defendants then asked the court to instruct the jury as follows:

"If the jury believe from the evidence that the owner of the property did not at or before the sale on the 11th day of January, 1864, authorize or direct any person to pay or offer to pay the tax assessed upon the property, and if they further believe from the evidence that any payment of such tax, or offer to make payment thereof,
186 would at that time, and until the surrender of Gen'l. Lee, in April, 1865, have been disapproved by the owners had it come to their knowledge, then a refusal by the commissioners to receive payment of such taxes from any person not so authorized, after the advertisement and before the sale, would not invalidate the title of the United States appearing by the certificate of sale produced by the defendants, nor would a general refusal to receive taxes, except from the owner in person, during such period invalidate such sale."

Which the court refused; to which refusal of the court, the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

And be it further remembered that the defendants then asked the court to instruct the jury as follows:

"If the jury believe from the evidence that G. W. P. Custis, through

whom the plaintiff claims, died in 1857; that the father and mother of the plaintiff left the property in question in May, 1861, and went into the confederate lines; that the United States immediately there-
187 after took military possession thereof, and continued to hold such possession until the close of the war; that since January, 1864, the United States has held the same under color of title valid upon the face thereof and of record in the county of Alexandria; that neither the plaintiff nor those through whom he claims has held possession of any portion of said property since May, 1861; that the defendants came into possession thereof peaceably and quietly, without any privity between them and the plaintiff or those under whom he claims, then the plaintiff cannot recover upon the ground of prior possession of the plaintiff, or those through whom he claims, without proving an uninterrupted adverse possession of fifteen years under color of title, and mere prior possession of the person through whom he claims is not sufficient proof of a legal title to the land upon which alone this action can be sustained."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered
188 of record and is certified accordingly.

The defendants then asked the court to give the following several instructions to the jury:

1st. "The jury cannot render a verdict for that part of the premises which was in possession of the defendants named, whose death has been suggested in this cause at the commencement of this suit, and a verdict cannot be given for the plaintiff for the remainder unless the jury can distinguish from the evidence such portion from that which was in the possession of the said deceased defendants so that it may described in the verdict."

2nd. "If the jury find that the plaintiff is entitled to only a part, or share of the premises, the verdict shall specify such part particularly, with the same certainty of description as is required in the declaration, and if the jury cannot ascertain such part from the evidence the verdict must be for the defendants."

3d. "The plaintiff is not entitled to a general verdict against all the defendants for all the property occupied by them, unless a joint possession can be found."

189 4th. "If the jury believe from the evidence that any of the defendants occupy distinct parcels of the property in controversy, in severalty or jointly, that other defendants possessed other parcels in severalty or jointly, then no verdict can be rendered against such defendants occupying such distinct parcels in severalty or jointly, except for the portion so held by one or more defendants separately from the others, but no verdict can be rendered against such or any of them except as to such parcels so held, a definite description of which can be ascertained from the evidence, so that each can be distinguished from the others, and unless it appears from the evidence of what particular parcel or parcels such defendants in severalty or jointly were in possession at the commencement of the suit."

Whereupon the counsel for plaintiff announced to the court that the plaintiff had concluded to suffer a nonsuit as to all of the defendants except Fredrick Kauffman and R. P. Strong, provided the plaintiff could be permitted to read to the jury that part of the record
190 which appears by the paper of which the following is a copy, to wit:

Petition of R. P. Strong.

In the circuit court of the United States for the eastern district of Virginia.

Your petitioners, Fredrick Kaufman, R. P. Strong, Tibbit Allen, Edward Austin, William H. August, Jerry Armistead, John Alexander, Julia Buckner, Charles Bailor, Joseph Brown, Stephen Bailey, Samuel Branham, Samuel Bowman, William H. Butler, Washington Bagby, Albert Brown, Charles Bailey, Randall Bates, John Burrill, James Brown, John T. Burgess, James Ball, Thomas Brown, Jerry Crutchfield, Charles Courtis, Fred. Contee, Fielding Contee, Benjamin Colet, Robert Carter, George Coleman, John E. Curry, William Conway, Jacob Crawford, Daniel Carroll, Owen Chase, George Conway, Charles Cook, Julia Church, Richard Cliffins, Isaac E. Clinkitt, James Clinkitt, Henry Conway, Albert Dickerson, Thomas Dabney, Lewis Davenport, Peter Dade, Dennis Diggs, John Davis, Ephriam Elan, Paul Elms, James Fisher, Hiram Fleet, Elias Fox, Jacob Foster, Harrison Goldman, Newton Goldman, Daniel Green, William H. Gant, Daniel Goldman, Fred. Goldman, George Green, Harrison Green, Arthur Green, Benjamin Green, Joseph Gardiner, Oliver Gardiner, William Grimes, William Harcum, Ruffin Holmes, Bernard Holmes, Henry L. Holmes,
191 Benjamin Hines, Conway Hart, Abraham Hammerson, Daniel Hogans, Farmer Harris, Austin Harris, William Jones, Winston Jones, H. A. Jefferson, Henry Jones, Solomon Jackson, Robert Jourdan, Fannie Jackson, Cyrus Jackson, Charles Jackson, Carter Johnson, Richard Lewis, James Lewis, James H. Lane, Jefferson Lane, William H. Lomax, Henry Lomax, Sallie Lipsicomb, Willis Lewis, Henry Morton, Joseph Morgan, Ison Morrison, Henry Mitchell, Lucinda Moran, Wesley Norris, Dinah Nash, John Offord, Jerry Overton, Thomas Owens, John W. Pendleton, Dennis Pinn, Mrs. Plummer (widow of Elias Plummer), William Plummer, James Parks, Lawrence Parks, Nathan Pendleton, Lot Purnell, Benjamin Pollard, George Ransom, James H. Robertson, Dandridge Richardson, John Richardson, Jasper Richardson, Seymour Roy, Caroline Robinson, William A. Rowe, John Simmons, T. Elzey Slaughter, John Abraham Slaughter, Lewis Somerville, Reuben Somerville, Allen Spencer, William E. Smith, Robert Smith, Nathaniel Smith, Martha Smith, Alexander Scott, Mrs. Scott (widow of Garland Scott), Nicholas Snow, Abraham Summers, Troy Shelton, Mrs. Spriggs (widow of Nathan Spriggs),
192 Daniel Stewart, Maria C. Syphax, James Turner, John Toales, Quincey Taylor, Henry Thomas, Albert Turner, Spencer Tasker, James N. Tinson, Scipio Terry, John W. Ward, Benjamin Wright, Byron Webb, Fielding Washington, Edward Willis, James Washington, Willis J. Wormley, Nelson Wormley, Jacob Williams, John Williams, Simeon Wright, Cornelius West, John Wells, Isaiah Wilder, Jesse Watkins, Jerry Smith, and George Washington, respectfully represent that a suit has been commenced in the circuit court for the county of Alexander, by George W. C. Lee, against your petitioners, in ejectment, to recover a certain tract of land called and known by the name of "Arlington," in said county of Alexandria, Virginia, claimed to contain eleven hundred acres of land, more or less, which suit has not yet been determined.

Your petitioners say that they do not claim title to said land, or interest therein, except as follows, to wit:

A certain portion thereof, consisting of about two hundred

acres thereof, more or less, is in charge of the War Department of the United States, and is being used as a national cemetery for the burial of deceased soldiers and sailors of the United States; and the said defendant Kauffman is a superintendent
193 thereof, under directions of said War Department. The remaining portion of said premises is set apart as a military fort and reserve connected therewith of the United States, and is now in charge of the defendant Strong, who is an officer of the United States, and occupying the same under orders of the War Department, and in obedience to an order thereof, of which the following is a copy, to wit:

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
Washington, D. C. July 26th, 1872.

The QUARTERMASTER-GENERAL, *U. S. Army:*

SIR: The Secretary of War directs that all that part of the Arlington estate outside the walls of the national cemetery be considered a military reservation pertaining to Fort Whipple, Va., and *and* under the immediate charge of the commanding officer of that fort. The Secretary has approved your recommendation that those persons who have crops on the proposed sites for new buildings shall be compensated therefor from the contingencies of the Army. A board of
194 survey has assessed the total amount at $540, which has been ordered to be paid to the parties. Also that the copy of the survey describing the metes and bounds of the Arlington estate be filed in the Quartermaster-General's Office as record of a military reserve, and be recorded in the proper land-record office in Alexandria, Va.

Very respectfully, your obedient servant,
(S'g'd) E. D. TOWNSEND,
Adjutant-General.

That such of said defendants, except Strong and Kauffman, as are upon the said premises occupy the same not as tenants, but under permission of the officer in charge of said military reservation, which is in writing or printing, and is substantially as follows:

FORT WHIPPLE, 187 .

This is to certify that is permitted to occupy acres of on the Arlington reservation until , 187 .

No rent will be charged for this occupation of the reservation to that date.

(Signed) *Officer in Charge.*

195 That the said estate was sold by the commissioners of taxes appointed under the act of Congress of June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and acting thereunder, and under acts amendatory thereof, for default of payment of direct taxes, assessed under said act, at which sale the United States became the purchaser thereof, and that the United States claim title and the right of possession to said premises under and by virtue of a certificate of sale made to them by said commissioners under said act and amendments thereto, and which title your petitioners set up and claim as a defence to the said action brought against them.

Your petitioners therefore petition that this court issue a writ of certiorari to the said State court requiring it to send to this court the rec-

ord and proceedings in said cause, and for such other relief as may be proper in the premises.

By counsel, W. WILLOUGHBY,
Att'y for Defendants.

196 I, W. Willoughby, an attorney of the circuit court of the United States for the eastern district of Virginia, do hereby certify that, as counsel for the petitioners, I have examined the proceedings against them, and carefully inquired into all the matters set forth in the petition, and that I believe them to be true.

W. WILLOUGHBY.

DISTRICT OF COLUMBIA,
County of Washington, ss:

On this 3d day of September, 1877, came before me R. P. Strong, one of the petitioners above named, and made oath that the facts set forth in said petition are true to his knowledge except as to the matters stated upon information and belief, and as to those matters he believes them to be true.

R. P. STRONG.

Subscribed and sworn before me Sept. 3d, 1877.

R. J. MEIGS, *Clk*,
By R. J. MEIGS, JR., *Ass't.*

At the same time offering to allow the defendants Strong and Kauffman to produce any further evidence desired by them, in contradiction or explanation of said paper or in reference to the subject
197 matter thereof which might be pertinent to the issues in the cause.

The defendants objected to the entering of such nonsuit as proposed but the court overruled such objection, to which ruling of the court the defendants then at the time excepted, which exception was duly entered of record, and is certified accordingly.

Whereupon by direction of the court the following order and entry of record was made in the cause:

Order of nonsuit.

"Thereupon the plaintiff, not prosecuting this suit further as to any of the defendants except Fredrick Kauffman and Richard P. Strong, but desiring the same to be discontinued as to the defendants not so excepted, it is ordered that he be nonsuited as to them, and pay to them five dollars damages according to law, besides the costs by the said defendants about their defence expended, to be taxed."

After said order of nonsuit had been entered the defendants withdrew their application to the court to give the four several instructions last asked for.

The defendants Strong and Kauffman then moved the court to
198 dismiss the cause as to them, upon the ground that the declaration alleged a joint entry into the premises and a joint withholding of the possession thereof from the plaintiff; that at this stage of the cause a severance could not be made, and that a nonsuit having been entered at the instance of the plaintiff as to a portion of the defendants, the remaining defendants were entitled to a dismissal as to them.

The court refused such motion; to which refusal the defendants then at the time excepted, which exception was duly entered of record, and is certified accordingly.

The plaintiff then offered to read in evidence to the jury the aforesaid petition sworn to by R. P. Strong, to the reading of which the defendants objected, as immaterial and incompetent, but the court overruled such objection; to which ruling the said defendants Strong and Kauffman then at the time excepted, which exception was duly entered of record and is certified accordingly.

Whereupon the said paper was read in evidence to the jury.

Testimony of R. P. Strong.

RICHARD P. STRONG was then recalled as a witness by the defendants, and further testified as follows:

199 A large number of the defendants were in the occupation of the premises when I took command at Fort Whipple, by permits from the Freedman's Bureau. Nearly all have since remained there. The houses, with the exception of a few, on the property at the time I first took possession are the property of the occupants.

That is, the United States has exercised no control over the houses. Under our arrangement with them, no right to enter their premises, as long as they comply with the conditions of their agreement, has ever been exercised.

They occupy their premises exclusively, except that I have supervising charge over them.

The services I spoke of, rendered for occupation, are rendered to the United States; no part of it is to me personally.

I claim no right in the property, except to exercise charge over it as directed by the War Department. Since these parties came into occupation I have never exercised any acts of ownership over the property on my part, and have never claimed any interest therein.

All of this property is so occupied by these colored men, ex-
200 cept that part in the immediate vicinity of the fort.

It is a part of the understanding by which they are there, that they are to preserve order. So long as they abide by that understanding I would not consider that I had any right to enter upon and dispossess them. About nine-tenths of the persons who are there were there when I took command.

I had no positive instructions as to these people, as to whether they should be disturbed, though the matter was talked over. I do not profess to understand what is the meaning, the legal meaning, of the term "tenant." A great majority are in possession of their property by virtue of authority given them by me under these permits. They were continued in possession by these permits, though most were there when I took command. Nearly all, if not quite, accepted these permits. These permits are given merely as evidence to show that the parties had a right to be in possession up to the time described in the permit. The conduct of these defendants within the last two years has been peaceable. As long as they are peaceable and well-
201 behaved I do not consider that I would have any authority to interfere with them, and should not exercise any such authority.

If I should arbitrarily interfere with any of the defendants the War Department would have power to overrule me and to restore them to their places.

Cross-examination:

I could designate the portion thus occupied on the map, but I have not the map with me. I am in charge of the whole of the property outside of the walls of the cemetery. I should judge that there are about 200 acres in the fort; the balance is occupied by these people. These 200 acres are covered by buildings used by the government as barracks. This lies north and northwest of the cemetery, adjoining it. I can designate the portion sufficiently from the map. (The paper last introduced by plaintiff, as aforesaid, was then read to the witness, whereupon he stated that the statements therein were true, to his knowledge.) They are according to the testimony I have heretofore given.

I think I have testified that I am in charge of the whole prop-
202 erty, except the cemetery, and that these persons are there not as tenants, but under my permission.

Q. You do now state that these persons do not occupy that place as tenants, but that you are now in possession of the whole of the place, and they are under you, as an officer of the government?

Ans. As I stated before, I found most of the parties there when the reservation was placed under my charge, and subsequent to my taking command of the fort under the order of the Secretary of War. The whole of the Arlington estate, except the cemetery, including the land occupied by them, was placed under my charge by the Secretary of War, and I am in possession of that place under the Secretary of War.

Q. And these parties have no right, except under these permits that you have given them, to permit them to remain there?

Ans. I should not disturb any of these parties on there as long as they behave themselves.

If they do not behave themselves, then I should exercise my authority as an officer of the government, in command of the place, to remove them.

203 If it were necessary under my orders as an officer in command to dispossess them I should be compelled by my duty to do so.

I took charge in 1872. Most of the permits have been issued since that time. If I were to interfere in the most proper case the War Department would have the right to interfere. They would have the right to do as they please in the matter. If the War Department should order me to remove them all to-morrow I would do so. I do not think, however, that if I should remove them all to-morrow the War Department would approve of my conduct. A portion of this property is in possession of Maria Syphax. I do not consider that as belonging to the reservation, and she does not stand upon the same footing as the others.

A map being shown to witness, he was desired to point out thereon the boundaries of the property occupied by Maria Syphax as they were read to him from an act of Congress, in 14th Statutes at Large, relating to the property of Maria Syphax, at page , which was done by him stating that the map appeared to give a true description
204 of this portion of the property, though he had no knowledge of the courses and distances.

The declaration, plea, order for certiorari, and stipulation in the pending suit of G. W. P. C. Lee vs. Branham and others, of which the following are copies, to wit:

RECORD IN LEE VS. BRANHAM.

VIRGINIA:

In the circuit court of the county of Alexandria.

Among the records and judicial proceedings of the circuit court of the county of Alexandria are the following, to wit:

G. W. C. LEE, PLAINTIFF,
against
AUSTIN BRANHAM, LEVI BOYKIN, AMELIA Contee, Susannah Contee, John Dennis, Zion Hill, Frank Johnson, Agnes Johnson, Washington Jackson, Martha Ann Moore, John Henry Plummer, Thomas Pryor, Jane Richardson, and Margaret Taylor, defendants. } In ejectment.

Be it remembered that heretofore, to wit, on Monday, the 7th day of May, 1877, that being the first day of May rules, came the plaintiff, by his attorney, and filed in the clerk's office of said circuit
205 court a declaration in ejectment against the defendants, with proof of the service of the notice thereof; which said declaration, with the proof of the service of the notice thereof, is in the words and figures following, to wit:

STATE OF VIRGINIA,
Alexandria County, ss:

In the circuit court of said county.

G. W. C. Lee, plaintiff, complains of Austin Branham, Levi Boykin, Amelia Contee, Susannah Contee, John Dennis, Zion Hill, Frank Johnson, Agnes Johnson, Washington Jackson, Martha Ann Moore, John Henry Plummer, Thomas Pryor, Jane Richardson, and Margaret Taylor, for this: For that heretofore, to wit, on the 5th day of January, 1875, the said plaintiff was possessed of a certain tract of land in the county of Alexandria and State of Virginia, called Arlington, and bounded and described as follows, viz, Beginning at a maple, standing on the west side of a small branch, and near where it runs into the Potomac River, at or near where the original corner red oak stood, the beginning of a tract of land granted Robert Howsen, for six
206 thousand acres, by patent dated the 21st of October, 1669; thence down the meanders of the Potomac River, including an inlet of nine acres covered with water, and six acres in Gravcley Creek, to a maple standing over a large spring issuing out of a high bank or hill, corner of the division between Gerrard Alexander and the heirs of Philip Alexander; thence with the line of division between said parties S. 72″ 45′ W. 448 poles, to a corner where the said division line intersects the west line of said Howsen's patent; thence northwardly with the west line of said Howsen's patent to a point where the same is broken in upon by the south line of Chapman's interference, and following the outlines of said interference eastwardly and northwardly to a point where the same meet the west line of said patent, to a pile of stones and several saplings, blaced, in the said line, on the south side of a stony hill; thence N. 84″ 30′ 348 poles to the point of beginning, containing eleven hundred acres of land, more or less, being the

same property which formerly belonged to George Washington
207 Parke Custis, deceased, which said premises the plaintiff claims in fee. And the plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the 6th day of January, 1875, entered into the said premises and ejected the said plaintiff therefrom, and unlawfully withhold from the plaintiff the possession thereof, to the damage of the plaintiff $5,000.

And the said plaintiff further avers that heretofore, to wit, on the 5th day of January, 1875, he, the said plaintiff, was possessed of a certain other tract of land, called and known by the name of Arlington, situate in the county of Alexandria and State of Virginia, containing eleven hundred acres, more or less, bounded on the east by the Potomac River, on the south by the lands of Horace S. Johnston, John R. Johnston, Guy Henry, and W. Perkins; on the west by the lands of Lott W. Crocker, William Elliott, John Causine, Septimus Brown, B. W. Hunter, Fendall Alexander, and H. R. F. Vinson; and on the north by the lands of Randolph Birch and Henry S. McCombe, said tract called Arlington being formerly the property of George Wash-
208 ington Parke Custis, deceased, and of which he died seized, which said premises the said plaintiff claims in fee. And the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the 6th day of January, 1875, entered into said premises and ejected the said plaintiff therefrom, and unlawfully withhold from the said plaintiff the possession thereof, to the damage of the plaintiff of $5,000.

And the said plaintiff further complains of the said defendants for that whereas the said plaintiff, on the 5th day of January, 1875, in the year of our Lord one thousand eight hundred and seventy-five, was possessed of a certain tract of land situated in the county of Alexandria, in the State of Virginia, to wit, Arlington, on the Georgetown road, northwest from the court-house nine miles, and bounded as follows: On the north, by the land of William H. Ross; east, by the Potomac River; south, by the lands of James Roach, John R. Johnston, and Guy Henry; west, by the lands of William Elliott,
209 Columbus Alexander, and John Tucker, containing eleven hundred acres, be the same more or less, which said premises the said plaintiff claims in fee. And he, the said plaintiff, being so possessed thereof, the said defendants afterward, to wit, on the 6th day of January, 1875, entered into the said premises and ejected the said plaintiff therefrom, and unjustly withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff of $5,000; and therefore he brings his suit.

WILLIAM J. ROBERTSON,
FRANCIS L. SMITH, *P. Q.*

To Austin Branham, Levi Boykin, Amelia Contee, Susannah Contee, John Dennis, Zion Hill, Frank Johnson, Agnes Johnson, Washington Jackson, Martha Ann Moore, John Henry Plummer, Thomas Pryor, Jane Richardson, and Margaret Taylor.

Please to take notice that on the first Monday of May, 1877, that being the first day of the May rules, 1877, of said court, I shall file in the clerk's office of the circuit court of Alexandria County, Virginia, a declaration in ejectment, of which the foregoing is a copy.

210 G. W. C. LEE,
By WILLIAM J. ROBERTSON,
FRANCIS L. SMITH,
His Attorneys.

Statement of mesne profits filed with the foregoing declaration.

Amount of rent at the yearly value of $1,000, from the 6th day of January, 1875, until verdict, which the said plaintiff means to demand for the use of the land in the declaration mentioned.

Statement of damages which the plaintiff means to demand for injuries done to the property in the foregoing declaration mentioned.

For the destruction and waste of the buildings and other property, $5,000.

STATE OF VIRGINIA,
Alexandria City, to wit:

This day Jefferson Tacey personally appeared before me, the undersigned, a notary public in and for the city of Alexandria, in the State aforesaid, and made oath in due form of law that on the 25th day
211 of April, 1877, he delivered a true copy and explained the contents of the foregoing declaration in ejectment, notice, and account to Austin Branham, to Susannah Contee, to John Dennis, to John Henry Plummer, and to Margaret Taylor, at their usual places of abode; and to the wife of Levi Boykin, over the age of sixteen years; to the wife of Zion Hill, over the age of sixteen years; to the wife of Frank Johnson, over the age of sixteen years; to the wife of Thomas Pryor, over the age of sixteen years, and gave each of them information of the purport thereof, at the usual places of abode of the said Levi Boykin, Zion Hill, Frank Johnson, and Thomas Pryor, the said Levi Boykin, Zion Hill, Frank Johnson, and Thomas Pryor not being found at their usual places of abode; and to Eliza Jackson, above the age of sixteen years, a member of the family of Amelia Contee, and gave her information of the purport thereof, at the usual place of abode of the said Amelia Contee, the said Amelia Contee not being found at her usual place of abode. And on the said 25th day of April, 1877,
212 he left a true copy of the foregoing declaration in ejectment, notice, and account, posted at the front door of the usual place of abode of Agnes Johnson, of Washington Jackson, of Martha Ann Moore, and of Jane Richardson, neither of the said Agnes Johnson, Washington Jackson, Martha Ann Moore, and Jane Richardson, nor their wives, nor any person above the age of sixteen years, having been found at their usual places of abode.

JEFFERSON TACEY.

Witness the signature of the said Jefferson Tacey and my own signature hereto, this 28th day of April, 1877.

K. KEMPER,
Notary Public.

And at another day, to wit, on Monday, the 7th day of May, 1877, came the plaintiff, by his attorney, and sued out of the clerk's office of said circuit court a rule against the defendants to plead to said declaration in ejectment; which rule, with the return thereon, is in the words and figures following, to wit:

213 The Commonwealth of Virginia to the sheriff of Alexandria County, greeting:

You are hereby commanded to summon Austin Branham, Levi Boykin, Amelia Contee, Susannah Contee, John Dennis, Zion Hill, Frank

Johnson, Agnes Johnson, Washington Jackson, Martha Ann Moore, John Henry Plummer, Thomas Prior, Jane Richardson, and Margaret Taylor, if they be found within your bailiwick, to appear at the clerk's office of our circuit court for our said county of Alexandria, at the rules to be holden for said court, on the first Monday in June, 1877, and plead to a declaration in ejectment this day filed in said office, with proof of the service of the notice thereof by G. W. C. Lee, and this they shall in no wise omit, under penalty of one hundred dollars, and have then there this writ.

Witness, Louis E. Payne, clerk of our said court, at the court-house aforesaid, this 7th day of May, 1877, and in the 101' year of the Commonwealth.

LOUIS E. PAYNE, *Clerk.*

214 Executed the within rule upon Austin Branham, Levi Boykin, Amelia Contee, Susannah Contee, John Dennis, Agnes Johnson, Washington Jackson, Thomas Pryor, and Margaret Taylor, by delivering a true copy of said rule to each one of them, respectively, in person, at their usual places of abode, on the 11th day of May, 1877; and upon John Henry Plummer and Jane Richardson, by delivering a true copy of said rule to each of them, respectively, in person, at their usual places of abode, on the 14th day of May, 1877; and upon Zion Hill and Frank Johnson by delivering to Lizzie Hill, wife of Zion Hill, Margaret, wife of Frank Johnson, true copies of said rule, and giving information of its purport to each of them, respectively, in person, at their usual places of abode, on the 11th day of May, 1877, each of said wives being over the age of sixteen years, the said Zion Hill and Frank Johnson not being found at their usual places of abode; and upon Martha Ann Moore, by delivering a true copy of said rule and giving information of its purport to Allen Spencer, on the 11th day of
215 May, 1877, at her usual place of abode, he being a member of her family, and over the age of sixteen years, the said Martha Ann Moore not being found at her usual place of abode.

W. C. WYBERT,
Sheriff Alex. Co., Va.

And at another day, to wit, at rules held in the clerk's office of said circuit court, on the 6th day of June, 1877, came the defendants, by their attornies, and entered a demurrer to the plaintiff's declaration, and the plea of the general issue that the defendants are not guilty of unlawfully withholding the premises claimed by the plaintiff in his declaration.

And this cause is continued.

VIRGINIA:

County of Alexandria, ss:

I, Louis E. Payne, clerk of the circuit court of Alexandria County, in the State of Virginia, do certify that the foregoing is a true transcript of the record in the suit instituted in said court in the name of G. W. C. Lee vs. Austin Branham and others, in ejectment.

216 In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the court-house of said county, on the 14th day of July, 1877, and in the 102' year of the Commonwealth.

[SEAL.] LOUIS E. PAYNE, *Clerk.*

In the circuit court of Alexandria County.

G. W. C. LEE.
vs.
AUSTIN BRANHAM. } In ejectment.

Costs.

Plaintiff.		
$5 50.	Tax.	
5 00.	Attorney.	
3 31.	Clerk.	$97 57
7 00.	Sheriff.	
7 00.	Notices.	
$28 01.		$97 57

Teste:

LOUIS E. PAYNE, *Clerk.*

(Declaration, &c., endorsed:) G. W. C. Lee vs. Austin Branham et als. In ejectment. Record. Filed July 25th, 1877. M. F. Pleasants, clerk.

Circuit court of the United States for the eastern district of Virginia.

217 To the honorable the circuit court of the United States in and for the district of Virginia:

The petition of Austin Branham, Levi Boykin, Amelia Contee, Susannah Contee, John Dennis, Zion Hill, Frank Johnson, Agnes Johnson, Washington Jackson, Martha Ann Moore, John Henry Plummer, Thomas Pryor, Jane Richardson, and Margaret Taylor, respectfully shows:

That your petitioners were, on or about the 25th day of April, A. D. 1877, served with copies of a declaration in ejectment, with notice thereunto appended that the same would be filed on the first Monday of May, A. D. 1877, in the clerk's office of the circuit court of Alexandria County, Virginia, within the said district.

That such copies of said declaration and notice were served on your petitioners in the said county of Alexandria, and within the territorial jurisdiction of said circuit thereof, and within the said eastern district of Virginia; that by such service a suit has been commenced, but not yet tried, against your said petitioners in the said circuit court of the county of Alexandria, and that the grounds of said suit and

218 proceedings, as stated in said declaration, are that your petitioners did, on the sixth day of January, A. D. 1875, enter into certain premises of one George W. C. Lee, the plaintiff in said suit, which said lands are in said declaration described, and eject him, the said plaintiff, therefrom, and unlawfully withhold from him, the said plaintiff, possession thereof.

That the said petitioners are in the occupation of said premiess only under the United States and by their consent, who claim title thereto by reason of a certificate of sale executed to them by the commissioners of taxes for Virginia, under the act for the collection of direct taxes in insurrectionary districts and for other purposes, passed by Congress June 7th, 1862, and amendments thereto, and the said suit and prosecution

was commenced for and on account of a right and title to said lands in said declaration mentioned under the said acts of Congress.

That this petition is made pursuant to section 643 of the Revised Statutes of the United States, which said statutes were approved June 22, 1874.

Wherefore your petitioners pray that the said suit and prose-
219 cution may be removed into the circuit court of the United States for the eastern district of Virginia, in the fourth circuit, pursuant to the statute of the United States in such case made and provided, and that a writ of certiorari or other proper process for such purpose may issue, and that they may have such other relief as may be just. And your petitioners will ever pray, &c.

his
AUSTIN + BRANHAM.
mark.

his
LEVI + BOYKIN.
mark.

his
AMELIA + CONTEE.
mark.

his
JOHN + DENNIS.
mark.

her
JANE + RICHARDSON.
mark.

her
MARGARET + TAYLOR.
mark.

AGNES JOHNSON,
WASHINGTON JACKSON,
By Counsel.

his
JOHN HENRY + PLUMMER.
mark.

his
ZION + HILL.
mark.

his
THOMAS + PRYOR.
mark.

her
MARTHA + MOORE.
mark.

her
SUSANNAH + CONTEE.
mark.

his
FRANK + JOHNSON.
mark.

UNITED STATES OF AMERICA,
Eastern District of Virginia, to wit:

I, John S. Fowler, a commissioner of the circuit court of the United States for the eastern district of Virginia, do certify that the foregoing petitioners, having been by me duly sworn, upon their oaths say that they have heard read the said petition and know the contents
220 thereof, and that the same is true of their own knowledge except as to those matters therein stated on information and belief, and as to those matters they believe the same to be true.

Given under my hand this 10th day of July, A. D. 1877.

JOHN S. FOWLER,
U. S. Com'r E. Dist. of Va.

I, W. Willoughby, an attorney practising in the circuit court of the United States for the eastern district of Virginia, do certify that as counsel for the above-named petitioners I have examined the proceedings against them, and carefully examined into all the matters set forth in their foregoing petition, and that I believe them to be true.

W. WILLOUGHBY.

Let the writ issue as prayed for in the petition.

RO. W. HUGHES, *Judge.*

(Petition endorsed:) 1329. Branham et al. ads. G. W. C. Lee. In ejectment. Petition. Filed July 12th, 1877. M. F. Pleasants, clerk.

221 The President of the United States of America to the judge of the circuit court of the county of Alexandria, State of Virginia, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the eastern district of Virginia, in the fourth circuit, shall be certified of a certain cause commenced before you against Austin Branham and others defendants, by George W. C. Lee, plaintiff, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court at the city of Alexandria forthwith, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness M. R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the nineteenth day of July, in the year one thousand eight hundred and seventy-seven.

[SEAL.] M. F. PLEASANTS, *Clerk.*

222 Executed this 24th day of July, 1877, by delivering to Louis E. Payne, clerk of the circuit court for the county of Alexandria, Va., a true copy of the within.

C. P. RAMSDELL,
U. S. Marshal,
By I. C. O'NEAL, *Deputy.*

(Endorsed:) 1329. U. S. circuit court. Austin Branham and others ads. Geo. W. C. Lee. Certiorari. Filed July 24th, 1877. M. F. Pleasants, clerk.

In the circuit court of the United States for the eastern district of Virginia:

GEO. W. C. LEE
vs.
FREDRICK KAUFFMAN AND OTHERS.

It is hereby stipulated that the motion founded upon the suggestion filed by the Attorney-General of the United States, in this cause, be continued until the next January term of this court, with the understanding that the cause is not then to be tried; that at least thirty days before such term of court each party shall furnish to the other a brief, with the authorities intended to be relied upon, so far as then ascertained; that issue will be made to such suggestion; that
223 notice will by that time be given of *of* any points intended to be made, if any, upon the question of right of removal from the State court to this court, or the regularity of such removal, and that the suit of this plaintiff against Branham and others shall abide the event of this suit, or if desired by either party the two suits shall be consolidated.

WM. J. ROBERTSON,
LEGH R. PAGE,
FRANCIS L. SMITH, JR.,
Plaintiff's Counsel.
W. WILLOUGHBY,
For the United States.

(Endorsed:) 1327. Lee vs. Kauffman et als. Stipulation of counsel, 4th September, 1877. Filed Sept. 4th, 1877. M. F. Pleasants, clerk.

Were then read in evidence by the counsel for the defendants, to the jury.

The above was all the evidence produced to the jury upon the trial of this cause.

And be it further remembered that thereupon the defendants then asked the court to instruct the jury as follows:

224 "If the jury believe from the evidence that the defendants named in the declaration in this cause, other than the defendants Strong and Kauffman, or any of them, or any other persons, occupied a part of the premises in controversy at the commencement of this suit, in severalty or jointly, in a parcel or parcels, distinct from said defendants Strong and Kauffman, or either of them, then the jury cannot find a verdict for the plaintiff against said Strong and Kauffman, or either of them, for such parcels not occupied by said Strong or Kauffman, and in such case, and in case a verdict is found against said Strong and Kauffman, or either of them, for a portion of the property, the verdict shall specify such part particularly with the same certainty of description as is required in the declaration, and if the jury cannot ascertain such part from the evidence, so as to so describe it, the verdict must be for the defendants Strong and Kauffman."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

225 And be it further remembered that the defendants then asked the court to instruct the jury as follows:

"If the jury believe from the evidence, that the United States is in the possession of the property in controversy, through its officers and agents charged with the control of the same; that the defendants occupy the same only as such officers and agents in obedience to orders of the War Department of the United States, and making no claim of right to the title or possession thereof except as such officers; that the United States is using the same as a national cemetery for the burial of deceased soldiers, and as a fort and reserve connected therewith, claiming title thereto under the certificate of sale proved in this cause, then the verdict must be for the defendants."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

And be it further remembered that thereupon the court, at
226 the request of the plaintiff, and contrary to the objection of the defendants, gave to the jury the following instruction:

"If the jury believe from the evidence that at the institution of this suit the premises in controversy were, or that any part thereof was, under the charge and in the occupation or possession of the defendants Strong and Kauffman, or either of them, under the direction of the Government of the United States, or of any department or officer thereof, then such occupation or possession is sufficient to enable the plaintiff to maintain his action against them respectively for the premises so occupied or possessed by them respectively."

To the giving of which instruction the defendants at the time excepted, which exception was duly entered of record and is certified accordingly.

The court then, at the request of the defendants, *then* gave to the jury the following several instructions:

221 The President of the United States of America to the judge of the circuit court of the county of Alexandria, State of Virginia, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the eastern district of Virginia, in the fourth circuit, shall be certified of a certain cause commenced before you against Austin Branham and others defendants, by George W. C. Lee, plaintiff, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court at the city of Alexandria forthwith, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness M. R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the nineteenth day of July, in the year one thousand eight hundred and seventy-seven.

[SEAL.] M. F. PLEASANTS, *Clerk.*

222 Executed this 24th day of July, 1877, by delivering to Louis E. Payne, clerk of the circuit court for the county of Alexandria, Va., a true copy of the within.

C. P. RAMSDELL,
U. S. Marshal,
By I. C. O'NEAL, *Deputy.*

(Endorsed:) 1329. U. S. circuit court. Austin Branham and others ads. Geo. W. C. Lee. Certiorari. Filed July 24th, 1877. M. F. Pleasants, clerk.

In the circuit court of the United States for the eastern district of Virginia:

GEO. W. C. LEE
vs.
FREDRICK KAUFFMAN AND OTHERS.

It is hereby stipulated that the motion founded upon the suggestion filed by the Attorney-General of the United States, in this cause, be continued until the next January term of this court, with the understanding that the cause is not then to be tried; that at least thirty days before such term of court each party shall furnish to the other a brief, with the authorities intended to be relied upon, so far as then ascertained; that issue will be made to such suggestion; that
223 notice will by that time be given of *of* any points intended to be made, if any, upon the question of right of removal from the State court to this court, or the regularity of such removal, and that the suit of this plaintiff against Branham and others shall abide the event of this suit, or if desired by either party the two suits shall be consolidated.

WM. J. ROBERTSON,
LEGH R. PAGE,
FRANCIS L. SMITH, JR.,
Plaintiff's Counsel.
W. WILLOUGHBY,
For the United States.

(Endorsed:) 1327. Lee vs. Kauffman et als. Stipulation of counsel, 4th September, 1877. Filed Sept. 4th, 1877. M. F. Pleasants, clerk.

Were then read in evidence by the counsel for the defendants, to the jury.

The above was all the evidence produced to the jury upon the trial of this cause.

And be it further remembered that thereupon the defendants then asked the court to instruct the jury as follows:

224 "If the jury believe from the evidence that the defendants named in the declaration in this cause, other than the defendants Strong and Kauffman, or any of them, or any other persons, occupied a part of the premises in controversy at the commencement of this suit, in severalty or jointly, in a parcel or parcels, distinct from said defendants Strong and Kauffman, or either of them, then the jury cannot find a verdict for the plaintiff against said Strong and Kauffman, or either of them, for such parcels not occupied by said Strong or Kauffman, and in such case, and in case a verdict is found against said Strong and Kauffman, or either of them, for a portion of the property, the verdict shall specify such part particularly with the same certainty of description as is required in the declaration, and if the jury cannot ascertain such part from the evidence, so as to so describe it, the verdict must be for the defendants Strong and Kauffman."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

225 And be it further remembered that the defendants then asked the court to instruct the jury as follows:

"If the jury believe from the evidence, that the United States is in the possession of the property in controversy, through its officers and agents charged with the control of the same; that the defendants occupy the same only as such officers and agents in obedience to orders of the War Department of the United States, and making no claim of right to the title or possession thereof except as such officers; that the United States is using the same as a national cemetery for the burial of deceased soldiers, and as a fort and reserve connected therewith, claiming title thereto under the certificate of sale proved in this cause, then the verdict must be for the defendants."

Which the court refused; to which refusal of the court the defendants then at the time excepted, which exception was duly entered of record and is certified accordingly.

And be it further remembered that thereupon the court, at
226 the request of the plaintiff, and contrary to the objection of the defendants, gave to the jury the following instruction:

"If the jury believe from the evidence that at the institution of this suit the premises in controversy were, or that any part thereof was, under the charge and in the occupation or possession of the defendants Strong and Kauffman, or either of them, under the direction of the Government of the United States, or of any department or officer thereof, then such occupation or possession is sufficient to enable the plaintiff to maintain his action against them respectively for the premises so occupied or possessed by them respectively."

To the giving of which instruction the defendants at the time excepted, which exception was duly entered of record and is certified accordingly.

The court then, at the request of the defendants, *then* gave to the jury the following several instructions:

Instructions to jury given by the court.

1st. "The plaintiff is not entitled to a general verdict against
227 the defendants Strong and Kauffman unless a joint possession by them at the commencement of this suit be found, and in case the jury find from the evidence that said defendants occupied distinct parcels in severalty, the plaintiff can recover only several judgments against them for the parcels so held by them separately from each other, and in such case the verdict shall specify each portion with the same certainty of description as is required in the declaration, and if the jury cannot ascertain such distinct parcels from the evidence so as to so describe it, the verdict must be for the defendants."

2nd. "The jury are to determine from the evidence whether the defendants Strong and Kauffman, or either of them, are in the occupation or possession of a part of the premises in controversy or of the whole thereof."

3rd. "If the jury believe, from the evidence, that a material portion of the premises in controversy was not occupied or possessed by the defendants Strong and Kauffman, or either of them, at the commencement of this suit, then a verdict cannot be given against them, or either of them, for such portion."

228 4th. "If the plaintiff show himself entitled to a verdict against these defendants Strong and Kauffman for a portion of the premises in con troversy only, then such verdict shall specify such part particularly as the same is proved, and with the same certainty of description as is required in the declaration, so that from such description possession thereof may be delivered."

5th. "If the plaintiff show himself entitled to a verdict against these defendants Strong and Kauffman for a part only of the premises in controversy, and if they are unable from the evidence to specify such part particularly, and with the same certainty of description as is required in the declaration, then they must render a verdict for the defendants."

And be it further remembered that after the court had submitted its instructions to the jury, and after argument by counsel before the jury, they retired to consider of their verdict, and thereafter returned into court with the following verdict:

Verdict.

229 "We, the jury find for the plaintiff, upon the issue joined, that he is entitled in fee to the whole of the premises in the declaration mentioned and described; and we further find that defendant Kauffman is in possession of so much of the said premises as is enclosed within the walls of the national cemetery, and containing two hundred acres more or less; and that the defendant Strong is in the possession of the remaining portion of the said premises in the declaration mentioned and described, with the exception of seventeen acres and fifty-three one-hundredths of an acre, more or less, part thereof, bounded and described as follows: Beginning at the intersection of the south line of the Arlington estate, with the centre line of a small run, said point of intersection being about one-fourth of a mile from the southwest corner of said Arlington estate, running thence westerly along said south line seven chains and forty links; thence in a northeasterly direction on a line, making an angle of thirty-five degrees with the said south line twenty-two chains and thirty-eight links; thence at right angles

230 in a southeasterly direction fifteen chains and sixty-seven links to the said south line of the Arlington estate; thence westerly along the said south line of the Arlington estate nineteen chains and ninety-two links to the place of beginning, which said seventeen acres and fifty-three one-hundredths of an acre are in the possession of one Maria Syphax.

WM. N. BERKLEY,
Foreman."

And upon the reading of said verdict the defendants filed and submitted a motion for a new trial, of which the following is a copy:

Motion for new trial.

In the circuit court of the United States for the eastern district of Virginia.

G. W. C. LEE
vs.
STRONG AND KAUFFMAN. } In ejectment.

The defendants move for a new trial on the following grounds:

That the court erred in overruling the objections made by defendants to the introduction of evidence to which exceptions were taken by defendants, and to overruling objections made by defendants to
231 orders made by the court during the progress of the trial.

That there is no evidence in the cause to sustain the verdict, and the verdict is against the evidence.

That the court erred in excluding evidence offered by the defendants, to which exclusion exceptions were taken.

W. WILLOUGHBY,
Counsel for Def'ts.

(Endorsed:) 1327. Circuit court of the U. S., eastern district of Va. G. W. C. Lee vs. Fredrick Kauffman et al. In ejectment. Motion for new trial. Filed Jan'y 30th, 1879. M. F. Pleasants, clerk.

The court overruled said motion; to which defendants at the time duly excepted, which exception was duly entered of record and is certified accordingly.

The following stipulation was then made by counsel for the respective parties, and assented to by the court:

Stipulation as to bill of exceptions.

In the circuit court of the United States for the eastern district of Virginia.

G. W. C. LEE
vs.
F. KAUFFMAN ET AL. } In ejectment.

232 It is hereby stipulated that a bill of exceptions may be prepared and entered as of the present term at the time to which this court has adjourned in April next.

W. WILLOUGHBY,
Counsel for Def'ts.
S. FERGUSON BEACH,
Of Counsel for Plaintiff.

JAN'Y 30TH, 1879.

(Endorsed:) 1327. G. W. C. Lee vs. F. Kauffman et als. In ejectment. Stipulation. Filed Jan'y 30th, 1879. M. F. Pleasants, clerk.

And the court doth certify that this cause was defended by L. L. Lewis, esq., United States district attorney for the eastern district of Virginia, and by the Hon. W. Willoughby, special counsel employed by the Government of the United States for that purpose. The defendants pray that this their bill of exceptions be allowed, signed, sealed, and made a part of the record, and ordered to be filed as a part of the record as of the date of January 30th, 1879; which is accordingly done. Witness the following signature and seal.

RO. W. HUGHES, *Judge.* [SEAL.]

233 (Endorsed:) 1327. G. W. C. Lee vs. Fredrick Kauffman et al. In ejectment. Bill of exceptions. Filed Jan'y 30th, 1879. M. F. Pleasants, clerk.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings in the cause of George W. C. Lee vs. Fredrick Kauffman et als. No. 1327 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Alexandria, in said eastern district of Virginia, this 15th day of July, A. D. 1879.

[SEAL.] M. F. PLEASANTS, *Clerk.*

234 WAR DEPARTMENT,
Washington City, March 19th, 1879.

To the honorable the Attorney-General:

SIR: In the suit of G. W. P. C. Lee against Kaufman et al., in the circuit court of the United States for the eastern district of Virginia, which suit involved a question of the title of the United States to the land at Arlington, now occupied as a U. S. military cemetery,
235 you are respectfully requested to obtain a writ of error from the Supreme Court of the United States, in order that the judgment of said circuit court in said cause may be re-examined.

Very respectfully, your obedient servant,

GEO. W. McCRARY,
Secretary of War.

(Indorsed:) George W. C. Lee vs. Fredrick Kaufman et als. In ejectment. Letter of Secretary of War. Filed April 3, 1879. M. F. Pleasants, clerk.

236 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between George W. P. C. Lee and the United States, a manifest error hath happened, to the great damage of the said The United States, as by

its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 3d day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Allowed by—

RO. W. HUGHES,
U. S. Dist. Judge for the Eastern District of Virginia, who tried the cause.

(Indorsed:) 1327. The United States vs. George W. C. Lee. In ejectment. Writ of error. Filed April 3, 1879. M. F. Pleasants, clerk.

237 The United States of America to George W. P. C. Lee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein The United States is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3d day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

RO. W. HUGHES,
U. S. Dist. Judge for the Eastern District of Virginia, who tried the cause.

238 Service of the within citation admitted this 3d day of April, 1879.

WM. J. ROBERSTON,
FRANCIS L. SMITH, JR.,
Counsel for Defendant in Error.

(Indorsed:) The United States, pl'ff in error, vs. George W. C. Lee, def't in error. Citation. Filed April 3d, 1879. M. F. Pleasants, clerk.

239 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between George W. P. C. Lee, plaintiff, and Frederick Kaufman and

Richard P. Strong, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 3d day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Allowed by—

RO. W. HUGHES,
U. S. Dist. Judge for the Eastern District of Virginia, who tried the cause.

(Indorsed:) 1327. George W. P. C. Lee vs. Fredrick Kauffman et al. In ejectment. Writ of error. Filed April 3, 1879. M. F. Pleasants, clerk.

240 The United States of America to George W. P. C. Lee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein Frederick Kaufman and Richard P. Strong are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3d day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

RO. W. HUGHES,
U. S. Dist. Judge for the Eastern District of Virginia, who tried the cause.

241 Service of a copy of this citation admitted this 3d day of April, 1879.

WM. J. ROBERTSON,
FRANCIS L. SMITH, JR.,
Counsel for Defendant in Error.

(Indorsed:) Fredrick Kauffman et als., pl'ff in error, vs. George W. C. Lee, def't in error. Citation filed April 3d, 1879. M. F. Pleasants, clerk. Filed 28th July, 1879. D. W. M., clerk.

(Indorsement on cover:) No. 219. The United States, plaintiff in error, vs. George W. P. C. Lee. And No. 220. Frederick Kaufman & Richard P. Strong, plaintiffs in error vs. George W. P. C. Lee. E. Virginia C. C. U. S. Filed 28th July, 1879.